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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1964

CRAWFORD TRANSPORT COMPANY, INCORPORATED,

Petitioner,

vs.

CHRYSLER CORPORATION
and
COMMERCIAL CARRIERS, INCORPORATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RECORD REFERENCE

Volume IV of the "Certified Record on Petition for Writ of Certiorari" furnished by the Clerk of the Court of Appeals for the Sixth Circuit is not paged. Consequently the references to the documents contained in Volume IV thereof designate documents without page numbers.

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In the

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CRAWFORD TRANSPORT COMPANY, INCORPORATED,

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CHRYSLER CORPORATION
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Crawford Transport Company, Incorporated, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 17, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, delivered orally and filed in the record on February 26, 1962 is reported in 235 F. Supp. 751 and is printed in Appendix B hereto, *infra*, p. 40. The opinion of the Court of Appeals for the

Sixth Circuit is reported in 338 F. 2d 934 and is printed in Appendix B hereto, *infra*, p. 27.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court, was entered on October 17, 1964 (R. Vol. IV). A timely Petition for Rehearing was filed by Petitioner (R. Vol. IV) and was denied by order entered in the Circuit Court of Appeals on November 13, 1964 (R. Vol. IV), making such judgment final, such order being printed in Appendix B hereto, *infra*, p. 67. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether an arrangement under which an automobile manufacturer and its wholly owned marketing subsidiary require franchised dealers, purchasing and taking title to new motor vehicles at factories in Detroit, to also purchase from such manufacturer through such subsidiary, as a condition to the purchase of such vehicles, the transportation services required to deliver such vehicles from such points of manufacture in Detroit to dealer locations throughout the United States, thereby tying the sale of such services to the sale of such vehicles, constitutes the type of tying arrangement judicially condemned as a violation of Section 1 of the Sherman Act (15 U. S. C. Section 1).

2. Whether action by an automobile manufacturer and its subsidiary, together with action of certain certificated common carriers selected by the manufacturer, in assuming control of all transportation of new motor vehicles produced by the manufacturer and sold to dealers and in

purchasing transportation from selected carriers to exclusion of other certificated common carriers, constitutes a violation of Sections 1 or 2 of the Sherman Act where the specific purpose of such action was to eliminate competition, and costs of competition to selected carriers, in the business of transporting new motor vehicles, to build a small group of large carriers through the absorption by selected carriers of assets of excluded carriers, to stabilize freight rates to the manufacturer and to allocate specific exclusive geographic territories to such selected carriers, free from competition, all of which purposes were accomplished by such action, and whether the findings of the trial court that such action did not constitute a violation of Section 1 or 2 of the Sherman Act were erroneous.

STATUTES INVOLVED

The statutory provisions herein involved are: Section 1 and 2 of the Sherman Act (15 U. S. C. 1, 2) and Section 4 of the Clayton Act (15 U. S. C. 15). These statutory provisions are printed in Appendix A, *infra*, pages 26-26.

STATEMENT

By its pleadings herein, petitioner has alleged that respondent, Chrysler Corporation (hereinafter referred to as "Chrysler"), entered into certain agreements and understandings with its wholly owned subsidiary, Chrysler Motors Corporation (hereinafter referred to as "Motors"), respondent, Commercial Carriers, Inc., (hereinafter referred to as "Commercial"), and others in unreasonable restraint of trade and commerce among the several states in the business of transporting new motor vehicles from points of manufacture in Detroit, Michigan to points of delivery at retail dealer locations in the several states, all in violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. Sections 1 and 2). This action

is a private antitrust action for treble damages, and the jurisdiction of the District Court was invoked under Section 4 of the Clayton Act (15 U. S. C. Section 15).

The principal question presented is whether Chrysler in conjunction with Motors, violated Section 1 of the Sherman Act by tying to the sale of new motor vehicles, produced by Chrysler in Detroit, the sale of the transportation service required to deliver the vehicles from producing factories to dealer locations. The specific question is not whether such a tying arrangement existed, but whether the existing arrangement ". . . is the type of tying arrangement that has been judicially condemned as a violation of Section 1 of the Sherman Act." (338 F. 2d 934, 937-938; Appendix B, *infra*, p. 33).

Petitioner is a common carrier by motor vehicle certificated by the Interstate Commerce Commission, having rights to transport new motor vehicles from points of manufacture in Detroit to points and places in Ohio and to portions of Kentucky, West Virginia and North Carolina. It and its predecessors in interest have been engaged in such business since 1931 (R. 102a, 122-126a, 319a).

Chrysler is one of the three largest manufacturers of new motor vehicles in the United States, producing between fifteen and twenty-one per cent (in the years here in question) of vehicles produced. Because of concentration of facilities in Detroit, it produced more than half (64.1% in 1957) of all vehicles manufactured in Detroit (R. 8-9a, 29-30a, 42a). Prior to November 1, 1956, Chrysler marketed its Detroit produced new vehicles by sale of the same to over 6,000 independent franchised dealers. These dealers sold to the ultimate consumers, adding into the sales price the cost to the dealer of transporting the vehicle from Detroit to the dealer's location (R. 8-9a, 29-30a). With each of these dealers, Chrysler had entered into a standard form agreement which controlled the terms of sale and

general operation of the dealer's business (R. 794-795a, 806-807a, 838-841a).

Prior to 1952, these standard form dealer agreements contained no provisions with respect to transportation. The vehicles were sold to dealers in Detroit, with title passing at the producing factory, and dealers were free to and did arrange for transportation of their own vehicles (R. 103a; Par. V, 10a; Par. V, 30-31a). In February, 1952, these standard agreements were amended so as to vest in Chrysler the power to arrange for transportation of such vehicles and to charge the dealers therefor. (R. 835a, 838a; 338 F. 2d 934, 935; Appendix B, *infra,* p. 28) (fn 1). This provision remained in effect in agreements between Chrysler and dealers until November 1, 1956, and thereafter continued in effect without material change in agreements between Motors and dealers (R. 103-104a, 807-808a, 840a). The rights vested in Chrysler under this provision were not exercised in any respect until November, 1954. (R. 104a, Finding 5).

Consequently, until November, 1954, dealers were free to and did purchase or provide the transportation services necessary to deliver their vehicles from the Detroit factories to dealer locations. (Par. V, R. 10a, 30-31a; R. 104a Finding 5; R. 133a, 739-740a). Under these circumstances, petitioner and other certificated common carriers competed actively for dealer accounts in such business, petitioner growing to operation of 125 tractor-trailer units in the nine years following the end of World War II and resumption of civilian production of vehicles. (R. 122-125a, 133a).

On November 17, 1954, Chrysler made effective its "prepaid freight" program under which carriers then transporting dealer-owned vehicles were instructed to bill Chrysler for the service (R. 133-135a; Par. VI, R. 11a, 31a; Ex. 6, R. 331-332a; R. 104a). Under this program, Chrysler charged the dealer, as a separately stated "transportation

charge" on the vehicle invoice, the actual cost to Chrysler of the service (R. 105-106a, Finding 11). In February, 1956, Chrysler began charging dealers a "destination charge," separately billed on the invoice, for transportation. Although Chrysler called these "f. o. b. point of destination" sales, the dealer continued to pay for the vehicles in full in Detroit, continued to acquire title at the factories in Detroit, continued to bear the risk of in-transit damage and continued to pay for the transportation by payment of the separately stated destination charge (R. 319a, 787a, 839a).

On November 1, 1956, Chrysler assigned to its subsidiary, Motors, all of its then effective dealer agreements (R. 792-797a). Thereafter Chrysler had no direct relationships with dealers, but sold its vehicles to Motors in Detroit (R. 786a, 794-795a, 810-811a). Motors marketed these new motor vehicles to its retail dealers under the same terms that Chrysler had previously marketed new vehicles. Motors continued to charge dealers the destination charges for transportation services, which charges were thereafter fixed by joint action of Chrysler and Motors (R. 816-819a). Under agreements between Chrysler and Motors (R. 359-361a), Chrysler continued to pay the actual cost of transportation to carriers and billed to and collected from Motors the fixed "destination charges" (R. 822-823a), such sums being received by Chrysler as a part of general revenues (R. 825a).

From November, 1954, to beginning of shipment of 1958 model vehicles in September of 1957, while Chrysler paid the actual costs of transportation to carriers and Chrysler or Motors collected transportation or destination charges from dealers, neither imposed on dealers an absolute requirement that transportation service be purchased with each vehicle, and neither interfered substantially with the dealer's selection of the mode of transport used and

the particular carrier used, dealer's requests for particular carriers generally being honored (R. 104a, Finding 6; R. 136-137a). Dealer solicitation remained the effective form of competition, with petitioner acquiring from 60 to 65 new dealer accounts by dealer solicitation during such period (R. 225-230a). Dealers "in effect purchased their own transportation by selection of their chosen carrier and the payment of the destination charge." (R. 375a). Dealers were further permitted to pick up their vehicles at the factories or to transport same on their own equipment without payment of the destination charge.

Beginning with shipment of 1958 model vehicles in September of 1957, Chrysler and Motors, as a part of a program which Chrysler called its Retention Carrier Program (hereinafter more fully described) began requiring each dealer to purchase with each new vehicle the transportation service required to deliver the vehicle from Detroit to the dealer's location. No vehicle could, under this program, be purchased unless the dealer also purchased from Motors such service and paid the destination charge. Dealers were not permitted to pick up their own vehicles in Detroit, nor to transport the vehicles which they owned in Detroit on their own transportation facilities. To this rule, exception was made for six of the more than 6,000 dealers, each of whom was required to pay a "delivery charge" on vehicles which they transported on their own equipment. (R. 376-377a; 787a; 358a, by avowal). The practice of honoring dealer requests for particular modes of transport or for particular carriers was terminated (R. 369-370a). Concurrently with the imposition of the *requirement* that dealers purchase from Motors the transportation services, destination charges made by Chrysler to Motors and by Motors to dealers were generally increased, all without any increase in the cost of such service to middleman Chrysler, increases in West Virginia and

Kentucky being as high as Ten Dollars per vehicle. (R. 204a). Under its practices which included the purchase of transportation at rates subject to regulation by the Interstate Commerce Commission and resale of such services, tied to the sale of vehicles, at "destination charges" fixed without supervision of any regulatory agency and by joint action of Chrysler and Motors (thus placing Chrysler in the position as a buyer and seller of transportation to fix its own margin of profit, it is undisputed that Chrysler intended to make "savings" of from Four Million to Ten Million Dollars annually (R. 513, 515a; R. 485-486a). While proof was not introduced that Chrysler "made money" on its overall transportation purchases and sales (the record does not disclose actual profit and loss experience), the record does disclose that, at least in Kentucky and West Virginia, destination charges exceeded actual cost of transportation services and Chrysler, in implementing the program that included the tie-in requirement, considered the "savings" would ". . . result in a profit to the Corporation and not to the dealer." (R. 513a).

The second question presented herein is whether petitioner had, at the conclusion of its evidence, established by a preponderance of the evidence an agreement, understanding, combination or conspiracy between and among Chrysler, Motors, Commercial and others in restraint of trade among the several states in the business of transporting new motor vehicles from points of manufacture in Detroit to dealer locations in violation of Section 1 of the Sherman Act, or in an attempt to monopolize that part of trade and commerce represented by said business in violation of Section 2 of the Sherman Act. The trial court sustained respondents' motions for judgment under Rule 41 (b), the action being tried without a jury, dismissing the action (R. 120-121a). An oral opinion was delivered (Appendix B, *infra*, p. 40) and Findings of Fact and Con-

clusions of Law entered (Appendix B, *infra,* p. 50, 65, R. 102-119a), under which the trial court found that there was "no evidence" introduced showing that the reduction of number of carriers transporting Chrysler manufactured vehicles under the Chrysler Retention Carrier Program was the result of any unlawful combination or conspiracy (R. 108-112a, Findings 20-33). The lower court further found that no unreasonable restraint of trade in such business resulted therefrom (R. 113a, Finding 35). The Circuit Court of Appeals has held such findings not to be "clearly erroneous" (338 F. 2d 934, 940; Appendix B, *infra,* p. 39).

The evidence introduced by petitioner on this issue consisted almost entirely of discovery depositions of officers and key employees of respondents, the written basic proposals and plans under which the Retention Carrier Program was developed and memoranda and correspondence written during course of development of the program. Practically no evidentiary conflicts exist in the record. The Chrysler Retention Carrier Program placed into effect with beginning of shipments of 1958 new vehicles in September, 1957, consisted of an arrangement under which Chrysler, through its subsidiary, Motors, and Motors' agreements with franchised dealers, assumed control of all transportation of new motor vehicles sold to dealers, and in using such control, forthwith reduced the number of common carriers transporting Chrysler built vehicles from seventy-nine to twenty, allocating among carriers retained specific territories and percentages of total business.

This Retention Carrier Program had its origin in two studies prepared by Chrysler's Director of Traffic, Howard Connelly, the first of which was submitted on September 21, 1956 (R. 508-521a) and the second of which was submitted on November 21, 1956 (R. 445-507a). The first of these reports was limited to recommendations with respect to vehicles moving into eight midwestern states. The

second was nationwide in scope. In the first report, it was recommended that Chrysler assume exclusive control of all transportation of new vehicles and reduce the number of carriers serving the eight state area under discussion (R. 508a). At that time, 83 automobile carriers, ranging in size from one truck to the nation's largest, were transporting such vehicles, all of which had developed strong dealer connections because dealers had been selecting their own carriers (R. 510-512a). In addition, many dealers transported their own vehicles (R. 512-513a). In this report Connelly reviewed discussions with presidents of three carriers (of which Commercial was one) in which he had been advised that such carriers could save at least 5% of their operating costs if necessity for solicitation of dealer business and other costs of competition (variable volumes of business, etc.) were eliminated. (R. 515-517a). "Savings" to Chrysler were estimated at Four Million Dollars annually (R. 515a) and only Dodge equipment would be used by carriers (R. 517a). The assets of those carriers whose present business would be seriously affected by loss of their traffic *would be absorbed* by the three selected carriers, prices for such to be fixed by a Committee including a representative of Chrysler (R. 518a). Transportation of dealer owned vehicles on dealer owned equipment would be prohibited (R. 519a).

This report was submitted to Robert P. Laughna, an executive of Chrysler. At time of trial, Laughna was president of Commercial, an office he assumed in 1961. Connelly was instructed to prepare a second and more comprehensive report. The second Connelly report, dated November 21, 1956, resulted, this report ultimately serving as the basis of the Retention Carrier Program (R. 445-507a, R. 607a). Here Connelly recommended that Chrysler assume all control of transportation (which action was taken ultimately by Chrysler and Motors by the tie-in), that the

number of carriers transporting Chrysler produced vehicles be reduced and that carriers retained be allocated specific areas (R. 447-449a; R. 454-455a). Again it was proposed that the carriers selected for retention be assisted by Chrysler in the mass acquisition of assets of carriers not retained (see listing of "CARRIERS . . . WHOSE FACILITIES ARE PROPOSED FOR ABSORPTION," R. 480a) whose business would be seriously affected by loss of traffic formerly acquired by dealer contacts, the report stating that *"The principal consideration on which the ultimate success of this proposal rests . . . is the willingness and ability of a select group of carriers to absorb the facilities of all carriers . . ."* not selected. (Emphasis supplied, R. 494a). Selected carriers were to be informed "of contingent performance conditions" (R. 456a). Chrysler intervention in carrier growth was considered essential (R. 476-477a). Estimates of cost to carriers of the proposed absorptions, or cannibalization, of non-retained carriers were computed and detailed (R. 494-499a, R. 729-730a). Connelly indicated that he had discussed absorptions with three carriers (including Commercial) (carriers listed are identified by number of units, See R. 464-474a), that only verbal assurance had been given Chrysler of willingness of these to participate (R. 494-498a).

Savings accruing to carriers selected through elimination of costs of competition (including constant volumes of business, better load make up with complete coverage in specified areas, elimination of costs of dealer solicitation, (R. 492-494a), and elimination of results of energetic competitive solicitation on competitors (R. 459a)), would be passed on to Chrysler by the elimination of proposed freight rate increases by the retained carriers, with resulting "savings" to Chrysler estimated at Ten Million Dollars annually (R. 486a).

Following submission of this second Connelly report, one Childs, an assistant to Laughna, was directed to prepare a proposal for reduction of carriers for presentation to executives of Chrysler for approval, same to be prepared "from the data contained in" the November 21, 1956 report (R. 607a). Using this November report as a basis, such proposal was prepared, presented to Chrysler's administrative committee and by it approved on January 9, 1957 (Presentation, R. 521-532a; R. 633-634a; R. 610a). The proposal so approved followed closely the November 21 Connelly report. Under Laughna's supervision, Chrysler proceeded to effect the program. The program was announced at a meeting of carrier representatives called by Chrysler at Detroit on May 17, 1957, at which time those present were advised that carriers retained would be allocated specific areas and necessity of dealer solicitation would be eliminated. (The entire text of the announcement is found at R. 430-445a). From that date to about July 1, carriers then transporting dealer vehicles were notified of their status as retention or non-retention carriers, those being notified as non-retention being advised that after close out of sale of 1957 models, they would not transport Chrysler built vehicles. (R. 647-648a, R. 388-390a). Petitioner was notified it was non-retention on June 20, 1957 (See Schedules, R. 533-541a).

Following such notifications, a meeting of representatives of retained carriers was called by Chrysler at Detroit on July 17, 1957. The purpose of this meeting was to give the retained carriers details of allocations of territory, percentages and volumes of traffic and to advise each of Chrysler policies each would be expected to follow (R. 393a). Each was given a booklet containing a listing of non-retained carriers in its territory and all were told it was their ". . . obligation to review the facilities of these companies . . .," to meet with their executives and where

applicable to reach agreements as to possible absorption, merger, etc. (Text is printed, R. 336-351a). Non-solicitation of dealers was established as a policy (R. 349a). Carriers were instructed specifically not to deal in lease arrangements (interline or interchange arrangements) with non-retention carriers (R. 348-349a), without prior written approval of Chrysler, under penalty of loss of traffic. Only Dodge trucks (produced by Chrysler) were to be employed in such transportation (R. 350a). Rates were to be held (R. 347a). In addition, Chrysler obtained, in private meetings, written agreements of some retained carriers to withhold protests in applications before the Interstate Commerce Commission filed by retention carriers where supported by Chrysler (Form letter, R. 545a, R. 393-395a, Letter agreements, R. 546a, 712a).

The absorption by carriers retained of assets of those not retained, as provided in the Connelly reports, proceeded throughout the summer of 1957. Chrysler "suggested" some acquisitions, assisted with some and was at least kept advised of others, evidenced by copies of letters and memoranda in the record. Commercial, whose president had discussed the programs initially with Connelly with respect to savings and absorptions, *supra*, had been informed of the purpose of the program and its territory allocations prior to the July 17 meeting (Letter, Ex. 63, R. 592-596a, in which Commercial's president refers to his conferences with Connelly ". . . at which time the inferences emphatically indicated improved traffic for this company *when and if the elimination of carriers was given administrative council blessing.*" emphasis ours). Commercial acquired a small carrier with key destination authority, Auto Express, Inc., at suggestion of Connelly (Ex. 63, R. 592-596a, R. 547-548a). At specific request of Chrysler, two carriers who filed protests in the proceeding before the Interstate Commerce Commission for approval

of the acquisition, Dixie Transport and McDowall Transport, withdrew such protests (R. 395-401a, R. 592-596a, R. 661-669a). United Transports, retained, acquired assets of non-retained Mills King and two other retained carriers agreed to withhold protests in the ICC proceeding at Chrysler's request (R. 402-408a, R. 550-561a, R. 680-684a, R. 713-714a). Western Auto Transports, retained, acquired Hanerhoff Transport, non-retained (R. 562a), and retained carriers looked into purchase of other non-retained carriers at suggestion of Chrysler (R. 569-572a, 549a). Treloar Trucking Co. was merged with Mack's Transport Service and Car Carrier Co., retained carriers (R. 563-565a). Other absorptions and attempts at same occurred (572-578a). Petitioner and four other non-retention carriers sold operating authorities to a corporation controlled by Dixie Transport, reported by Chrysler as a retained carrier (See memorandum, R. 579-580a, Ex. 45).

Beginning with shipment of 1958 models in September, 1957, the program initiated by the Connelly reports was placed into effect by Chrysler and Motors. By use of Motors' dealer agreements, control of transportation was vested in Chrysler. Retention carriers were given their allocated territories free from competition of non-retention carriers and non-retention carriers were no longer permitted to transport dealer owned and Chrysler produced vehicles for dealers. Chrysler "prohibited" the practice of retention carriers dealing in leasing, interline and interchange movements with non-retention carriers (R. 383-384a) and would have stopped such practices if same had occurred (R. 384a). Freight rates were held and the proposed increases noted in the Connelly report (R. 486a) were not effected (R. 672-673a). Chrysler's policy of prohibiting dealer solicitation was enforced (R. 421-422a, R. 582a Ex. 51). Petitioner, as a non-retention carrier, lost all the dealer business it had acquired over years of dealer-contracted and dealer-selected

transportation practices. With 95% of its business in the transportation of vehicles Chrysler had manufactured and sold to dealers, it had no alternative but to cease business as an independent common carrier (R. 163a, 186a).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in holding that the arrangements under which Chrysler and its subsidiary, Motors, required dealers to purchase with each new motor vehicle the required transportation service was not the type of tying arrangement judicially condemned as a violation of Section 1 of the Sherman Act is contrary to decisions of this Court and, in turning the question of validity of a tying arrangement on a determination of "direct" or "indirect" profits to the corporation imposing the tie-in, presents an important question of Federal law which should be settled. The decision, in making such distinction between direct and indirect profits, is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Osborne* v. *Sinclair Refining Co.*, 1960, 286 F. 2d 832, *cert. den.*, 366 U. S. 963, and the decision of the Court of Appeals for the Seventh Circuit in *Goodyear Tire and Rubber Co.* v. *Federal Trade Commission*, 1964, 331 F. 2d 394, *cert. granted*, December 14, 1964.

Section 1 of the Sherman Act makes unlawful *all* contracts, combinations and conspiracies which unreasonably restrain trade and commerce among the several states. Tying arrangements have by this Court uniformly been held to violate Section 1 of the Sherman Act where a not insubstantial volume of business is affected. In *International Salt Co.* v. *United States*, 332 U. S. 392, this Court condemned as violative of Section 1 certain leases of equipment which required the lessees to use therein only products of the lessor, holding that such leases unreasonably re-

strained trade and commerce in foreclosing to competitors of the lessor the market for salt products represented by the lessees. This court there held that *tying arrangements which foreclose competitors from any substantial market* are unreasonable *per se*.

In *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, this Court condemned as violative of Section 1 "preferential routing" clauses contained in certain sales and lease agreements under which the buyers or lessees agreed to ship over Northern Pacific lines products manufactured or produced on the lands sold or leased providing rates of Northern Pacific were comparable. In its Opinion, this Court included tying arrangements among practices ". . . which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . . without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (356 U. S. 1, at 5). The Court noted that such arrangements deny competitors free access to the market in the tied product or service, while buyers are forced to forego their free choice between competing products or services. Citing *International Salt, supra*, the Court there held that tying arrangements are unreasonable *per se* whenever a party has sufficient economic power in the tying product to appreciably restrain free competition in the market for the tied product or service and a "not insubstantial" amount of interstate commerce is affected.

Here Chrysler and its subsidiary controlled the sale of over half (64.1% in 1957) of all new motor vehicles produced in the Detroit area (R. 42a). The volume of trade and commerce affected by the tying arrangements was in excess of Sixty Million Dollars annually (cost of truckaway transportation of Chrysler vehicles, R. 486a). The requisites of economic power in the tying product and of volumes of commerce affected in the test prescribed in *International*

Salt and *Northern Pacific, supra,* by this Court have been established. This standard of illegality of tying arrangements has not been modified by this Court, but has been reaffirmed in *United States* v. *Jerrold Electronics Corporation,* 365 U. S. 567, affirming *per curiam United States* v. *Jerrold Electronics Corporation,* 1960, E. D., Pa., 187 F. Supp. 545, and in *United States* v. *Loew's Incorporated,* 371 U. S. 38. Each of these decisions involved the tying by the defendant to the sale or lease of its product the sale of a product or service of the defendant or of an affiliated corporation. In this case, the transportation services which Chrysler purchased from carriers at rates subject to regulation by the Interstate Commerce Commission and resold to dealers under the tying arrangements at its "destination charges," were performed by carriers in which Chrysler owned no legal interest.

While this Court has not passed specifically on the question, two of the Circuit Courts of Appeals, the Fourth and the Seventh, have held that the tying by the seller of one product to the sale thereof of goods, products or services of another constitutes a violation of Section 1 of the Sherman Act, both applying the basic standard of illegality applied by this Court in the cases mentioned above. *Osborn* v. *Sinclair Refining Co., supra,* and *Goodyear Tire and Rubber Co.* v. *Federal Trade Commission, supra.* In each of these cases, the courts have held that arrangements under which refiners (in *Osborn,* Sinclair, and in *Goodyear,* Atlantic Refining Company) required dealers, if they wished to continue selling refiners' products under lease and sales agreements, to purchase substantial quantities of Goodyear accessories constituted *per se* violations of Section 1 of the Sherman Act. In each of these cases the refiner had an agreement with Goodyear which provided for payment to the refiner of commissions on sales of Goodyear products by the refiner's dealers.

In *Osborn,* the court indicated that the perniciousness of the tie-in was not excused, but aggravated by the fact that the defendant was not in the business of selling the tied product, but was employing its economic power to force its dealers to do business with a supplier in another industry under an arrangement which yielded an extraneous revenue to the defendant (286 F. 2d 832, 839-840). In *Goodyear,* the Court applied the *Northern Pacific* standard relating to the effect on competition, stating that "(S)urrender by the dealer of his freedom to choose between brands of TBA is *per se* illegal if a 'not insubstantial' amount of interstate commerce is affected." (331 F. 2d 394, at 402).

The opinion of the Sixth Circuit herein adopts the argument of Chrysler, stated at 338 F. 2d 934, 938 (Appendix B, *infra,* p. 33), that a tying arrangement is an unreasonable restraint of trade when a seller, by tying the sale of one item to the sale of another, is using his dominance in the tying item's market to avoid the hazards of free competition in the tied item's market, and that the judicially condemned type of tying arrangement necessarily involves a seller who not only competes in the tying item's line of commerce, but who also participates for profit in the area of competition to which the tied item belongs. The court below found that ". . . Chrysler benefited financially to the extent that it saved millions of dollars in the cost of transportation . . ." (338 F. 2d 934, 939, Appendix B, page 36), but found no evidence that Chrysler received ". . . direct profits from the transportation carriers."

This finding ignores the direct gain to Chrysler in areas where its destination charges exceeded its costs of the service it purchased and the power it obtained to fix destination charges at its pleasure and thus control direct profits on the services it purchased and resold through Motors to dealers. Nevertheless, on the finding of no "direct" profits from carriers, the court below has adopted

the principles advanced by Chrysler's argument and has held that, regardless of effect on competition in the market for the tied service, a tying arrangement is not violative of Section 1 unless the seller imposing the tie-in is a "participant for profit" in the area of competition to which the tied item belongs. Such holding makes controlling factors unrelated to competitive effects of the tying arrangement, and is contrary to the standard illegality prescribed by this Court in *International Salt, supra,* and *Northern Pacific, supra,* and is in conflict with decisions of the Fourth and Seventh Circuits in *Osborn, supra,* and *Goodyear, supra.*

All of the decisions of this Court fix the standard of illegality of tying arrangements not on the profit or loss to the defendant imposing the tie-in, *but on the effect upon competition* in the market to which the tied product or service belongs. This is the standard specified in Section 1 of the Sherman Act. Accordingly this Court has held that elaborate proof with respect to the business necessities of the defendant imposing the tie-in is immaterial. *International Salt, supra; Northern Pacific, supra.* The court below has undertaken to approve the arrangement on the ground that Chrysler's competition with Ford and General Motors made the arrangement necessary, stating that the interest of Chrysler could not be subordinated to that of transportation companies and that "(W)hat benefits Chrysler ultimately inures to the benefit of Chrysler dealers and to the public." (338 F. 2d 934, 939; Appendix B, page 36). But this Court has never held that the public interest lies in permitting the giants of industry, in the name of competition with each other, to destroy, through the use of practices otherwise forbidden by law, competition in lesser industries. This Court has specifically held otherwise. *United States* v. *Singer Manufacturing Co.,* 374 U. S. 174. This holding, in addition to the

other matters developed herein, presents an important question of application of the federal antitrust laws.

2. The trial judge entered Findings of Fact and Conclusions of Law (R. 102-119a); Appendix B, *infra,* p. 50), under which he found that there was no evidence introduced showing that the decision of Chrysler to reduce the number of carriers transporting Chrysler built vehicles from Detroit was the result of any unlawful combination or conspiracy and that such decision was not reached in an attempt to monopolize trade in the business of transporting such vehicles. The Circuit Court of Appeals has held, under authority of *Commissioner* v. *Duberstein,* 363 U. S. 278, that it is bound to accept the factual inferences drawn by a trial judge from undisputed facts, unless clearly erroneous, and has held that the findings herein of the trial judge are not clearly erroneous.

The evidence introduced by petitioner in the trial court, relative to the existence of unlawful agreements, combinations, understandings and conspiracies consisted almost wholly of documentary evidence and depositions taken in discovery of officers and key employees of the respondents. The trial judge had no opportunity to observe demeanor of witnesses or for apportioning of degrees of credibility. In *Miller* v. *Commissioner,* 1964, 327 F. 2d 846, C. A. 2, the Second Circuit, in considering *Duberstein,* held that under such circumstances, where evidence is documentary, the rationale of *Duberstein* in applying the "clearly erroneous" test is not applicable. To this extent, the opinion of the lower court herein and the opinion of the Court of Appeals for the Second Circuit in *Miller* v. *Commissioner, supra,* are conflicting and the conflict should be resolved by a decision of this Court.

Notwithstanding this conflict as to the test to be applied, it is the position of petitioner that the findings of the trial court were "clearly erroneous." Both the trial court and

the Court of Appeals have attached no significance whatever to the participation of Motors by agreement with Chrysler in assuming control of all transportation in 1957 under the agreements which Motors had with its dealers. The opinion of the Court of Appeals specifically states that the court attached no significance to action of Motors for the reason that Motors "took no independent action in any of the transactions which give rise to Crawford's complaint." (338 F. 2d 934, Appendix B, p. 30). This Court, however, has held that in antitrust actions a parent corporation and its subsidiary are subject to the full impact of the antitrust laws and that such corporation cannot enjoy the benefits of separate corporate entities and escape the impact of the antitrust laws by insisting that they are a single trading unit. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc., et al,* 340 U. S. 211; *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593.

To show a combination or conspiracy, it is not encumbent upon the party having the burden of proof to prove that each defendant participated in the combination or conspiracy in all of its ramifications. In order for one to be found guilty as a conspirator ". . . it need only be shown that, with knowledge of the existence of the conspiracy, he knowingly performed an act to promote or aid in the attainment of that known conspiracy." *United States* v. *National City Lines,* 1951, 186 F. 2d 562, 572, C. A. 7, *cert. den.,* 341 U. S. 916. It was the express purpose of Chrysler in placing into effect its Retention Carrier Program to eliminate competition, and the costs of competition, in the business in issue and to bring about the absorption of these carriers not retained by those retained. Commercial, with such knowledge, as is demonstrated by the letter in evidence from Van Beckum to Laughna (R. 592-596a), as well as other retention carriers, participated in the combination in proceeding with absorptions of assets of non-

retained carriers and in adherence to the policies of Chrysler prohibiting these retained carriers from dealing with non-retained carriers in leasing (interchange and interline) arrangements (R. 348-349a, 383-384a).

Chrysler has contended, and the court below has held, under authority of *United States* v. *Colgate & Co.*, 250 U. S. 300, that the refusal to deal with non-retention carriers by Chrysler was a unilateral refusal. While the finding of the trial court that the *decision* by Chrysler not to deal with non-retention carriers was a unilateral decision may be supported by evidence, the *action* of Chrysler in securing (through threats of loss of business, R. 348-349a) adherence to its policy of refusals by retention carriers to deal with non-retention carriers has moved the plan as executed outside of the protection of *Colgate*. *United States* v. *Parke, Davis and Company*, 362 U. S. 29; *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207; *Silver* v. *New York Stock Exchange*, 373 U. S. 341. The evidence with respect to Chrysler's policies in this regard and with Chrysler's enforcement of these policies is uncontradicted. The findings of the trial court that no evidence of an unlawful combination was introduced are clearly erroneous.

Section 2 of the Sherman Act makes unlawful all attempts to monopolize any part of the trade or commerce among the several states. This section of the Sherman Act was intended to 'er unlawful all attempts to reach the end prohibited by Section 1. *Lorain Journal Company* v. *United States*, 342 U. S. 143. It is sufficient, if some appreciable part of interstate commerce is the subject of a restraint or an attempt to monopolize. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225-226.

It was respondents' intention, as is demonstrated in the Connelly reports (R. 508-521a, R. 445-507a), the proposal approved by the Chrysler Administrative Committee (R. 521-532a) and in the acts of Chrysler in placing these pro-

posals into effect, to eliminate competition in the business of transporting new vehicles from Detroit and to eliminate non-retention carriers as competitors in such business through absorption of their assets by selected carriers. Indeed, it was felt by Chrysler officials that the ultimate success of the Retention Carrier Program depended upon such absorptions (R. 494a). Connelly had secured verbal assurance from officers of three selected carriers that each would cooperate in such a program (one of these being Commercial) prior to November, 1956 (R. 494-498a). As put by Commercial's president in a letter of July 2, 1957, "the primary purpose for the elimination of carriers was to build a small group of large operators" (R. 593a). It was the plan to and Chrysler did allocate territories to carriers retained on a geographic basis. A small group of large carriers was developed through the program and assets of many non-retained carriers were absorbed.

There is no substantial conflict in the evidence with respect to the intentions of respondents or with respect to the manner in which these intentions were acted upon. A unique and important question of federal antitrust law is presented by these uncontroverted facts — whether a major purchaser of services through use of its purchasing power may lawfully assert its powers for the express purpose of eliminating competition among suppliers of such services, requiring absorptions and mergers, in order to secure price advantages from lower costs of operation to the suppliers in a competitive free market.

Our position is that the uncontroverted facts, developed in evidence documentary in form, has established clear violations of Sections 1 and 2 of the Sherman Act and that the findings of the trial court are in this case clearly erroneous.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX A

STATUTES INVOLVED

Sherman Act. Section 1 (15 U. S. C. Section 1)

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who

shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Sherman Act. Section 2 (15 U. S. C. Section 2)

"§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, or conviction thereof, shall be punished by fine not exceeding fifty thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Clayton Act. Section 4 (15 U. S. C. Section 15)

"§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

APPENDIX B

OPINIONS BELOW

No. 15307

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

CRAWFORD TRANSPORT COMPANY, INCORPORATED,
Plaintiff-Appellant,

v.

CHRYSLER CORPORATION and COMMERCIAL CARRIERS, INCORPORATED,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

(Decided October 17, 1964.)

Before: WEICK, Chief Judge, CECIL, Circuit Judge, and PECK, District Judge.

CECIL, Circuit Judge. This appeal involves an alleged violation of Sections 1 and 2 of the Sherman Act. (Sections 1 and 2, Title 15, U.S.C.) The case was tried to the court without a jury. After the plaintiff had completed the presentation of its evidence, the trial judge sustained the defendants' motion, made in accordance with Rule 41 (b) of Federal Rules of Civil Procedure, to dismiss the action. The trial judge gave an oral opinion, made findings of fact and conclusions of law in writing (... F. Supp. ...), and entered judgment for the defendants.

There is no material dispute over the basic facts upon which the litigation is predicated. The plaintiff-appellant, Crawford Transport Company, Incorporated, hereinafter called Crawford, is a corporation organized under the laws of West Virginia with its principal place of business in Ashland, Kentucky. It is a common carrier, by motor vehicle, certificated by the Interstate Commerce Commission, with rights, among others, to transport in interstate commerce new automobiles, and related products in initial movements from points in and near Detroit, Michigan, to points in Ohio, Kentucky, West Virginia and North Carolina. Prior to October, 1958, its principal business was the transportation of Chrysler motor vehicles. Chrysler Corporation, hereinafter called Chrysler, one of the defendants-appellees, and a manufacturer of motor vehicles, is incorporated under the laws of Delaware and has its principal place of business at Detroit, Michigan. Commercial Carriers, Inc., hereinafter called Commercial, the other defendant-appellee, is a corporation organized under the laws of Delaware, with its principal place of business at Romulus, Michigan.

At the time of the commencement of this action and for many years prior thereto Chrysler marketed its products through a system of Direct Dealers, with each of whom it entered into a Direct Dealer Agreement. The agreement[1] between Chrysler and its dealers, in effect in 1952 and

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[1] Sales Agreement between (divisional name) Direct Dealer and Chrysler Corporation, ... Division. Delivery of Motor Vehicles.

(Chrysler) may deliver motor vehicles by rail, haulaway, boat, or any other means of transport, or deliver them for driveaway, in conformance with the policy of (Chrysler) at the time. (Chrysler) may deliver motor vehicles to a carrier that (Chrysler) selects consigned to the city or town where DIRECT DEALER'S place of business is located (or to an unloading point located conveniently near that city or town) "to (Chrysler's) order, notify DIRECT DEALER," or may deliver them directly to DIRECT DEALER at Detroit, Michigan, or at any other point that (Chrysler) hereafter may establish.

thereafter, gave Chrysler the sole power to determine the means and manner of delivering vehicles purchased by the dealer, to prepay the freight and to bill the dealer for a transportation charge in addition to the sale price of the vehicle. Prior to November, 1954, Chrysler sold its vehicles to its dealers f.o.b. at the point of manufacture or assembly. The dealers then paid all shipping costs direct to the carriers on billing from them. During this time the carriers competed for business by soliciting both the dealers and the manufacturers.

In November, 1954, Chrysler changed its policy and began to sell its vehicles to its dealers on a "freight prepaid" basis. Under this system the carriers billed the freight costs to Chrysler and received payment from it. Chrysler then billed the dealer for the price of the vehicle plus the cost of transportation. Chrysler chose or approved the carriers and selected the method of transportation.

In February, 1956, Chrysler again changed its policy and began billing its dealers a "destination charge" for the delivery of its vehicles. This charge varied from area to area and for different model vehicles. In fixing this charge Chrysler took into consideration its transportation costs as well as comparable charges made by Ford and General Motors.

Chrysler organized Chrysler Motors Corporation, referred to herein as Motors, in September, 1956. This was a wholly-owned sales subsidiary incorporated under Delaware law. In November, 1956, Chrysler entered into an agreement with Motors by which it assigned to Motors all its direct sales agreements with dealers throughout the United States and agreed to sell to Motors' dealers all vehicles manufactured and assembled by Chrysler for domestic retail sale. Chrysler retained the right to prepay freight and to choose the means of transportation and the carrier to be used on all vehicles sold to Motors and shipped

to its dealers. (We attach no significance to the organization of Motors, so far as this action is concerned. It took no independent action in any of the transactions which give rise to Crawford's complaint).

In 1955, Howard J. Connelly, Director of Traffic for Chrysler, began a study of Chrysler's transportation practices with a view to adopting a more efficient and economical system of distribution of the Company's products. This study ultimately led to the adoption of the plan which is the subject of this litigation. The plan as adopted on January 9, 1957, provided for the reduction from approximately eighty to sixteen carriers whose services Chrysler would retain. The retained carriers were to be selected on the basis of past performance, growth potential, financial stability, freedom from competitive alliances and adequacy of certificate rights. The major advantage claimed by Chrysler for the plan was insuring ". . . the timely, economical delivery of the vehicular products of this corporation to the dealer and customer through the efficient employment of transportation facilities."

On May 17, 1957, Chrysler held a meeting in Detroit attended by representatives of all the carriers then transporting Chrysler vehicles from Detroit. The new plan was announced at this meeting and the changes in traffic policy were explained in detail. The representatives were advised as to the five criteria upon which each carrier would be evaluated to determine whether it would be selected as a retained carrier. It was also announced at this meeting that individual discussions would be held with representatives of each carrier at which time each carrier would be advised whether it would be a retained carrier for the shipment of 1958 model automobiles in September, 1957.

Crawford was notified about June 20, 1957, that Chrysler would not tender traffic to it commencing with the shipment of 1958 model vehicles. Approximately fifty

other carriers were so notified between May 17th and July 17, 1957. Chrysler notified Commercial about June 27, 1957, that it would be a retained carrier. Chrysler gave similar notices to approximately fifteen other carriers.

Subsequently Crawford, Dixie Transport Company, Inc. and several other non-retained common carriers with Interstate Commerce Commission rights into the southeastern part of the United States formed a new corporation under the name of Southern Transport, Inc., referred to herein as Southern, to which Chrysler agreed to tender traffic. In the summer of 1957, consummating negotiations dating back to 1954, Commercial acquired all of the stock of Auto Express, Inc., a small (nonretained) carrier which held direct line operating rights from Detroit, Michigan, to the State of Florida.

Chrysler held a meeting in Detroit, Michigan, on July 17, 1957, with the representatives of all the retained carriers to announce its traffic policies for the 1958 model vehicle shipments. Mr. Sam Crawford, Vice President of Crawford, attended the meeting as a representative of the proposed Southern. At this meeting Chrysler announced that it would no longer honor dealer requests as to carrier selection and that retained carriers would be expected to solicit Chrysler business from Chrysler. It distributed maps of the country showing the areas into which Chrysler planned to tender traffic to particular carriers, including Southern, based on each carrier's destination territories as fixed by the Interstate Commerce Commission. It was also announced that Chrysler would, from time to time, make such changes in its traffic policies as it might deem appropriate. During this meeting, Chrysler expressed the hope and expectation that the retained carriers would not increase their rates, would use Dodge trucks and would not enter into interchange agreements with non-retained car-

riers without Chrysler's written approval. It was suggested by Chrysler that the retained carriers had an obligation to review the facilities of the non-retained carriers, meet with their executives and where applicable reach agreement as to possible absorption, merger, consolidation or purchase of equipment. The retained carriers were urged to conduct such negotiations on a fair and equitable basis.

At the July 17th meeting, Commercial was notified that Chrysler intended to tender to it all of the traffic for the state of Kentucky. In 1957 and prior years, Crawford had been given a portion of the traffic to Eastern Kentucky, and Commercial had been given the traffic to Western Kentucky. The organization of Southern was completed in August, 1957, and Chrysler thereupon tendered to it traffic for the shipment of 1958 model vehicles to destination points in the states of Florida, Georgia, North Carolina and South Carolina.

Crawford transferred operating rights to Southern and in exchange therefor received 19% of all of Southern's outstanding voting stock. Southern leased from Crawford and the other participating carriers operating equipment under terms of payment approved by the Interstate Commerce Commission. Southern went out of business in August, 1958.

It was estimated by Chrysler that its new plan of transporting motor vehicles to its dealers would save it several millions of dollars annually in shipping costs.

The principal question presented on this appeal is whether Chrysler violated Section 1 of the Sherman Act by tying to the sale of its new motor vehicles to its dealers, the sale of the transportation service required to deliver the motor vehicles from the point of manufacture to the dealer. It is well established by decisions of the Supreme Court that it is a per se violation of Section 1 of the Sherman

Act for a seller of one product, as a condition of the sale of that product, to unreasonably require the purchaser to buy another product if a substantial amount of business is affected. *Northern Pacific Railway Co.* v. *United States* (1958), 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed. 2d 545; *Times-Picayune Publishing Co.* v. *United States* (1953), 345 U.S. 594, 735 S.Ct. 872, 97 L.Ed. 1277; *International Salt Co., Inc.* v. *United States* (1947), 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20.

The specific question here is whether the plan adopted by Chrysler for the delivery of its 1958 and subsequent model vehicles is the type of tying arrangement that has been judicially condemned as a violation of Section 1 of the Sherman Act. The trial judge held that it was not. We agree.

Chrysler contends that, "a tying arrangement is an unreasonable restraint of trade when a seller, by tying the sale of one item to the sale of another, is using his dominance in the tying item's market to avoid the hazards of free competition in the tied item's market." It further contends that the condemned type of tying arrangement involves a seller who not only competes in the tying item's line of commerce but participates for profit in the area of competition to which the tied item belongs. Counsel for Crawford concedes that if Chrysler's position is correct concerning the type of tie-in sale that is judicially condemned as a violation of the Sherman Act the trial judge correctly decided the issue. The *International Salt Co.*, supra, and the *Northern Pacific Railway*, supra, cases are typical examples of tie-in sales that are judicially condemned.

In *International Salt* the company leased its patented machines for the utilization of salt products with the requirement that the lessees must purchase from it the salt and salt tablets used in the machines. In *Northern*

Pacific the company sold land which it owned with the requirement that the purchasers ship the produce raised on the land over the railroad which it operated. *United States* v. *General Motors Corp.*, 121 F.2d 376, C.A. 7, 1941, strongly relied on by counsel for the appellant is of the same type. General Motors attempted to tie to the sale of its motor vehicles, financing to the purchaser of those motor vehicles through General Motors Acceptance Corporation, a wholly owned subsidiary engaged in the business of automobile financing.

Osborn v. *Sinclair Refining Co.*, 286 F.2d 832, C.A. 4, cert. den. 336 U.S. 963, falls into the same category as the cases above cited. There Sinclair Refining Company[2] tied the sale of its products to Osborn, a dealer, to the sale of products of Goodyear Tire and Rubber Company with whom it had an agreement. Both Sinclair and Sherwood entered into an agreement with Goodyear in 1944 by which they agreed to actively assist Goodyear in selling and in promoting the sale of Goodyear TBA to their dealers. Goodyear was to pay Sinclair and Sherwood a 10% commission on tires and batteries sold to their dealers and commissions of 5% to 10% on car and home merchandise. The court found that Sinclair entered into an express agreement with Osborn to purchase the Goodyear products in order that he might be restored as a gasoline dealer. Osborn's failure to abide by this arrangement contributed to the subsequent cancellation of his lease from Sinclair. Sinclair received a direct profit from its tying arrangement. Having an agreement to sell Goodyear products for a commission, Sinclair is in the same position as though it had tied one of its own products to the sale of gasoline.

More nearly parallel to the facts in the case before us are *Miller Motors, Inc.* v. *Ford Motor Company*, 252 F.2d

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[2] Used interchangeably with Sherwood Bros., Inc., a wholly owned subsidiary.

441, C.A. 4, and *Nelligan* v. *Ford Motor Company*, 262 F.2d 556, C.A. 4. In these cases regionally organized Lincoln-Mercury dealers were instrumental in creating advertising funds, which came to be known as LMDA. Each dealer contributed to LMDA from the sale of each Lincoln and Mercury car, an amount agreed upon by the regional organization. The Ford Motor Company cooperated with this plan and it was known among dealers that Ford policy required dealers to become members of LMDA. It was also a part of Ford policy to terminate a dealer's franchise if he resigned from LMDA. These actions were brought by dealers who charged that Ford violated Section 1 of the Sherman Act by tying the requirement to contribute to LMDA to the dealer franchise. In both cases the court held there was no violation. In the *Miller* case the court said, at p. 446: "It is not shown that Ford had any interest in the Kenyon and Eckhardt advertising agency except to obtain effective advertising service from it. Ford was not using its economic position as an automobile manufacturer to invade and dominate the advertising business."

The court distinguished the *General Motors* case, supra, which distinction is apropos to our case. It said, at p. 447: "In the *General Motors* case, to the contrary, it was shown that the defendant, reaching out to monopolize the business of financing the resale of automobiles of its manufacture, formed a conspiracy unreasonably to interfere with commerce. The court declared that the mandatory scheme to impose the financing of automobile sales *through a concern which it wholly owned, and whose profits it enjoyed,* was unreasonable and bore no relation to the good will of General Motors or its line of cars." (Emphasis added.) The statement of counsel for the appellant that the Fourth Circuit reversed the principle of the *Ford Motor* cases a year later in the *Sinclair Refining* case has no support in fact.

No case has been cited to us nor have we found any contrary to the principle of judicially condemned tie-ins as stated by counsel for Chrysler.

Considering now the facts of the case before us, Chrysler owned no transportation companies and had no financial interest in any of the transportation carriers to which it tendered traffic for its 1958 and subsequent models. It did not seek to invade and dominate the automobile transportation carriers' business. True, Chrysler benefited financially to the extent that it saved millions of dollars in the cost of transportation but it received no direct profits from the transportation carriers. Chrysler made no permanent commitments to any of the carriers which it selected to transport its 1958 model vehicles. As was announced at the meeting of July 17, 1957, it would, from time to time, make such changes in its traffic policies as it deemed appropriate.

The purpose of the Sherman Act is to preserve for industry free access to competitive markets and to prevent monopolies in restraint of trade. It is well to take a look at the commodity and at the nature of the business with which we are dealing here. Chrysler is a manufacturer of automobiles. Its two great competitors are Ford and General Motors. The public interest lies in the protection of that competition. Chrysler found it necessary to centrally control the delivery of automobiles to dealers in order to compete more effectively with Ford and General Motors in all areas of the country. To allow Chrysler's financial position in the field of automobile manufacture to be sapped and drained through unnecessary transportation costs would be unreasonable. To subordinate Chrysler's interest to that of the transportation companies, would, so to speak, permit the tail to wag the dog. What benefits Chrysler ultimately inures to the benefit of Chrysler dealers and to the public.

"In the absence of any purpose to create or maintain a monopoly, the act (Sherman) does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States* v. *Colgate & Co.*, 250 U.S. 300, 307.

We conclude that Chrysler was guilty of no tying arrangement in violation of Section 1 of the Sherman Act.

Another claim made by Crawford is that Chrysler and Commercial violated Section 1 of the Sherman Act by entering into a combination and conspiracy with Motors and other retention carriers in restraint of trade among the several states for the purpose of: eliminating competition, and costs of competition to retention carriers, including Commercial, in the business of transporting new motor vehicles from points of manufacture to dealer locations; to stabilize freight rates; to increase under supervision of Chrysler the size of retention carriers by absorption of assets of Crawford and other non-retention carriers; and to allocate to retention carriers, free from competition of Crawford and other nonretention carriers, specified territories and percentages of business of transporting dealer-owned new vehicles.

Finally, it is claimed on behalf of Crawford that Chrysler, acting alone or in combination or conspiracy with defendant Commercial, Motors or other retention carriers, violated Section 2 of the Sherman Act by acting with an intent to eliminate competition of Crawford and other non-retention carriers in the business of transporting new motor vehicles from Detroit, and with an intent to create a monopoly in the business of transporting such motor vehicles.

These claims are equally without merit. We find no evidence of any contract, combination or conspiracy in restraint of trade or any attempt on the part of Chrysler,

alone, to monopolize the business of transportation of new motor vehicles, or by combination with Commercial, Motors or any of the other retention carriers to monopolize such business. Nor do we find evidence of usurpation by Chrysler of the Interstate Commerce Commission's authority over rates charged and areas served by interstate carriers.

On the issues of combination and conspiracy in violation of Sections 1 and 2 of the Sherman Act, the trial judge found facts as follows: "There is no evidence that Chrysler undertook its program to reduce the number of motor carriers to whom it tendered traffic by reason of or pursuant to any unlawful contract, combination, agreement, understanding or conspiracy with defendant Commercial or with any other individual or corporation.

"Chrysler's decision to reduce the number of motor carriers to whom it tendered traffic was a unilateral one made by it for the sole purpose of obtaining a more efficient and economical distribution of its products and was not made as a part of or pursuant to any unlawful contract, combination, agreement, understanding or conspiracy with defendant Commercial or with any other individual or corporation.

"There is no evidence that Chrysler undertook its program to reduce the number of motor carriers to whom it tendered traffic in an attempt to monopolize trade in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to any other point in the United States.

"Chrysler's decision to reduce the number of motor carriers to whom it tendered traffic was not made in an attempt to monopolize trade in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to any other point in the United States."

The evidence supports these findings of fact. Neither the findings of basic facts nor the inference drawn therefrom are clearly erroneous. This Court is bound to accept the factual inferences drawn by a trial judge from undisputed basic facts, unless they are clearly erroneous. *Commissioner* v. *Duberstein*, 363 U.S. 278, 291, 80 S.Ct. 1190, 4 L.Ed. 2d, 1218; *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746; *Evans* v. *Commissioner*, 330 F.2d 518, 519, C.A. 6; *In re Plonta*, 311 F.2d 44, 47, C.A. 6.

The findings of fact of the trial judge are supported by the evidence and his conclusions of law are in accordance with accepted legal principles.

The judgment of the District Court is affirmed.

UNITED STATES DISTRICT COURT
E. D., Kentucky
Catlettsburg Division

No. 497

CRAWFORD TRANSPORT CO., a Corporation,
Plaintiff,

v.

CHRYSLER CORPORATION, a Corporation, and Commercial Carriers, Inc., a Corporation,
Defendants.

(January 18, 1962.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(November 5, 1962.)

SWINFORD, Chief Judge.

In the first place I want to review briefly, if I may, the background of this litigation. The plaintiff, the Crawford Transport Company, has been in business since 1931. During that time its principal patron was Chrysler Corporation and Chrysler Motors. It was a common carrier with rights which it has acquired over some five states, including part of Kentucky, West Virginia, North Carolina, Georgia, and possibly one other — I don't know whether Florida is included in that or not.

> "MR. PARK: No, sir.
>
> "THE COURT: It is not. And it has established itself as a trustworthy and dependable carrier. That fact is attested by the defendant Chrysler Corporation, itself, its officers who have suggested both by their words and their actions that Chrysler placed implicit confidence in the ability of this plaintiff to discharge

> the duty of expeditiously and reasonably transporting the products from manufacturer to dealer. That is a condition, however, which existed with a number of other carriers, and it reached the place where there were about 83 carriers, I believe at one time, transporting Chrysler products as common carriers."

We must recognize, of course, that in the automobile industry, like in other widely covered fields in our economic life, there has been a considerable change in methods. Chrysler had 6,000 dealers, at one time possibly more, but so far as our case goes here, 6,000 scattered from the East Coast to the West Coast, and from the Great Lakes to the Gulf, and it used these 83 carriers to transport its products. Since February of 1952, the contractual arrangement between Chrysler and its dealers was that Chrysler would ship the product to the dealer and that Chrysler would have the right to say who would carry the automobile. In 1954 that right was reasserted and reestablished and while these dealers were recognized as to their wishes and desires, as to what carrier would be used, that I believe was only persuasive and not conclusive of the agreement between the dealer and the manufacturer. That is, it seems to me, only a reasonable proposition. Transportation of an automobile is a part of the sale of an automobile. To send an automobile to where it is going to be sold, attractively presented and in its best form at the end of a 2.000-mile or 200-mile or 50-mile journey, is just as much a part of having that automobile presentable to the public and acceptable to the public as it is when it first comes off the assembly line at the plant. And so it seems to me that it would be unreasonable to say that a manufacturer whose investment was in that car could not have the right to say who was going to haul it. And while the car was owned by the dealer from the time it was delivered to the carrier, it was with his consent and by his agreement that that carrier

was selected because he had agreed when he went into his agency agreement with Chrysler that he would let Chrysler choose the transportation method. Evidently, according to the evidence here, there were a number of variances in that. Some of these dealers hauled their own cars, with the consent of the manufacturer; some of them drove the cars through at one time, within a certain radius. But there seems to have been no definite pattern and there was never apparently any controversy between the manufacturer and the dealer about this arrangement.

Chrysler found that in order to sell its cars most advantageously and to serve the public as it thought better and get rid of the automobiles for a consideration, it should adopt a method which had been in vogue for some time with its two chief competitors, Ford and General Motors. It reduced the number of carriers from 79 as it was at that time, to 16. General Motors, had 14 and Ford, 16, or vice versa. Chrysler called into its office, these 79 carriers on May the 17th, 1957, and gave this demonstration to all of these carriers and gave the reason why it wanted to make this reduction, not that it was making any change in the selection of the carriers, because it had had that prerogative since 1952, but that it was reducing the number of carriers and explaining to them what they might do to be retained as carriers. That meeting of May 17th, 1957, didn't happen spontaneously. It took some planning, it took some discussion. I think the discussion started back in '56 between the executives of Chrysler Motors. They may even have had discussion with their co-defendant. There is no great proof that any intrigue was going on, but it undoubtedly was a matter which required a considerable planning and effort to get up to the point where they could make this demonstration on May the 17th, 1957. Now, a business that makes plans and discusses its program doesn't necessarily lay itself liable to committing a law

violation. Much of the documentary evidence that is offered is in the form of letters and correspondence. The whole thing was revealed to all of these carriers on the 17th of May. No protest was made as far as the record goes. On July the 2nd, Mr. Van Beckum wrote that he was not satisfied at all with the arrangement that Chrysler had in mind. Mr. Laughna wrote back the "football letter," in which he stated that Mr. Van Beckum's corporation was supposed to be one of his best players on the team, he didn't think they could win when their best player was dissatisfied, or something to that effect, but that doesn't necessarily commit either of them to intrigue.

And so, to summarize briefly, you have after the meeting of May the 17th, 1957, some correspondence back and forth between various agencies and offices and the formation of what is identified as Southern Transport Company, in which the plaintiff, Crawford Transport, was given 10% of the stock and an executive office. The Court is not in a position to say just what happened to Southern, except that it was not successful. There are implications that there was an inner group of control in the hands of those who sought to eliminate others or to bring about a different program. Evidently it was badly managed some place along the line. And so the defendant Commercial Carriers and others then proceeded to transport these automobiles through these areas, to 6,000 dealers all over the country.

That, briefly, I believe is the substance of the facts. The Sherman Act, Section No. 1, which provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal:"

[1] I am asked to find that what went on was an illegal arrangement between Commercial Carriers, Chrysler Mo-

tors and Chrysler Corporation. The evidence just does not go that far, gentlemen. The burden of proof on the facts alone is not sustained, any more than you might sustain a finding of conspiracy and restraint in numerous business connections in this country. To hold under these facts, admitting for the sake of discussion, that these people have committed a crime by what they have done in trying to reduce the cost of their operation would be to subject, I am afraid, numerous corporate enterprises or individual business establishments to serious consideration. The defendant, Chrysler, according to the statement of counsel, did not make this change to make money, but made it to keep from losing money. The transportation system that it had, had proven very unsatisfactory and was leading it to serious financial stress in that department; some millions of dollars, according to statement of counsel, had been lost by the methods which it had been following. And so it is difficult for me to say that a business house, irrespective of how large or how small, seeks to establish a new system or new plan to keep from losing money, is thereby doing something in restraint of trade to make money and to enrich itself unjustly at the expense of either some other business enterprise or the public. I can't find it is in the spirit of the Sherman law.

As far as Commercial Carriers is concerned, I can't see that it has done anything wrong. There has been some correspondence, of course, but to hold that it has been guilty of crime by just these few letters that are brought here, and that is all we have of any real consequence, for the Court to say that it has been guilty of crime against the public and against the plaintiff, you are asking for a credulity which this Court doesn't have. All it did was try to get business, just like Crawford was trying to get business.

As far as Motors is concerned, Motors was not created until the fall of 1956 and whatever arrangement there was between Chrysler and its dealers had been going on for some months at least, since February of 1956, and as a matter of fact, the general understanding for several years. I can't see that Motors figures in here has any great significance. To me there is a significant distinction between this case and the General Motors Acceptance Corporation case in 121 F.2d 376. That was a joint enterprise for the purpose of making money.

[2] The defendant, has got to be proven guilty of a crime by a preponderance of the evidence. Plaintiff must sustain the burden. The great mass of testimony offered here, both from the witness stand and from the depositions brings into the record the numerous instances of communications from the program that Chrysler had, the program that Commercial Carriers had, the plan, the program that Motors had, but that is not of sufficient dignity to prove to a court of equity that any carrier who is offended by having his business taken away from him, because of a change in transportation facilities and transportation program of a corporation, is entitled to triple damages. The burden which the plaintiff must sustain is a real burden. It is not something inconsequential. To sustain such a rule of law, would upset I believe much of the business in this country with reference to transportation. That a man engaged as a transporter has staked a claim with a manufacturer and he and not his employer is going to determine who is going to do its transportation business, irrespective of how unqualified the transporter may be or may become. That would place the burden upon the shipper to show that the transporter is not qualified to handle the product. And to lay down as a rule of law that the transportation company gets a prescriptive right, so to

speak, in a line of business, would require more interpretation of the antitrust laws than we can find in these books.

[3] The first thing we should consider from the standpoint of the case is the tie-in proposition. There is not a tie-in here between Chrysler and Motors and Commercial Carriers such as the tie-in between General Motors and General Motors Acceptance Corporation (121 Fed. (2) 376). There is not a tie-in here to control commerce. As I said at the outset, the business of this defendant Chrysler is to sell automobiles and to get them delivered in an attractive form so they will induce the public to buy them and what happens to them on the road is just as important as what happens to them in the assembly plant. They could bring out the most beautiful Imperial in the history of the industry and if it were not properly handled by a transportation company, speedily and properly, all that had gone into the making of that car would be lost. But it can't be said to be a tie-in, because a manufacturer is interested in who is going to carry his product to the market. That is an accepted business practice. Otherwise there would be no point in any of these agreements between the manufacturer and the dealer. So it is just as vital to Chrysler to have that car delivered in the proper way as it is to see that it is properly put together or that it is properly made, and to say that it doesn't have the right to do that and if it attempts to do it, tries to select the carrier, it has engaged in an unlawful enterprise, seems to be contrary to the reasonable conception of almost, if not altogether, universal business practices.

There is the question of allocation of territory. That is answered in the fact that Chrysler didn't allocate any territory, neither did Commercial Carriers. The territory was agreed upon by those who had been using it and one of those who had been using it was Southern Transport of which the plaintiff was a part. They allocated it to them-

selves and they accepted it and they told Chrysler, "We will take care of all these states." That is in the correspondence. It wasn't Chrysler that allocated it, it wasn't Commercial Carriers, it wasn't any unlawful combine that allocated it. It was an arrangement between sensible, reasonable businessmen. These are not children, but mature men experienced in business of this character, and they went into what they thought was a good thing. It may not have been what they would have liked, but it was the best thing under the circumstances and they allocated the territory among themselves. Simply because some of them did not successfully carry on the enterprise or the transportation company that was launched cannot be said to prove a crime on the part of these defendants.

There is also a question raised by counsel of a concerted refusal to deal. I listened very attentively to Mr. Downing's argument on that point and I can't find that there is any evidence to sustain that claim, unless I say that the evidence proves by a preponderance that a shipper who chooses one carrier over another, all of whom are seeking his business, commits a crime if he doesn't divide it. There is no concerted effort here. I don't find anything in this proof to sustain to the degree which the law requires that these people went together and just said, "Let us turn our back on the plaintiff, let us not have anything to do with Crawford." As a matter of fact, they sought to have something to do with Crawford. They contracted with him, they agreed with him and went on and said, "Yes, you can haul our products and continue to do it and we will give you the job," encouraged it — and which was not difficult for Crawford to do, Crawford was well equipped to do what they wanted him to do and he was meeting more or less his standard of transportation business that he had practiced all those years. But in order to reduce the number — that is the whole thing — could they or could they not reduce

the number of carriers? In order to do that, he said, "We and some six or eight others will go into a separate corporation and we will still carry your business just as we have done before."

But the plaintiff is asking me to say here today that Chrysler still has to do business with 79 different carriers. That would be the judgment of this Court, if I sustained the prayer of the complaint, that you can never get rid of a common carrier if you once do business with him. I can't find damages, without saying that Chrysler has to keep its 79 carriers. And not only that, if this carrier is successful here, there will be 79 others suing Chrysler for the same thing and if they are ordered to resume their practice of having 79 carriers, then they will also owe them everything they have lost since 1958 or maybe since 1957, when they first brought out the 1958 model.

Now, they also talked about the recommendations to these carriers that they hold down the rates. They seem to deduce from that that that was a serious offense or a serious show of crime, wrongdoing. That is no more than shop talk, that is just common sense, that when you are hiring somebody to do something for you, you say, "Hold down the costs as much as you can." It certainly isn't any combine to cut out other transportation carriers.

They also raise the question of the use of Dodge trucks as being an element or a circumstance which should be considered as evidence to establish the wrong. I don't believe that that could be very seriously argued that giving someone a substantial contract, to ask them at least or to suggest to them rather forcibly, if you will, that, "If you are going to sell shoes, we don't want you to go barefooted." "If you are advocating this product, it looks like you ought to be using it." There is no wrong in recommending and asking. It didn't affect Crawford anyway because Crawford

used Dodge trucks, I think almost a hundred per cent in hauling Chrysler products.

In order to find Chrysler liable under Section 1, it would be necessary to find that it conspired with either its co-defendant, Commercial Carriers, or with its subsidiary, Motors. By reviewing what I have here and said what I have with reference to evidence in the case, I don't think that you have made out a case against any of the defendants under Section 1, either in law or in fact.

Section 2 of the Sherman Act makes it unlawful to create or to monopolize in restraint of trade or commerce, any industrial operation. Chrysler could be guilty of that alone without any collaboration on the part of anyone. I don't think that you have made out a case against Chrysler alone, under Section 2 of the Sherman Act, either in law or in fact.

I have not attempted to refer to all of the evidence, of course. I have not referred to any cases. I feel that what I have said is sustained by the record and by the decided cases of the federal courts and primarily, of course, the Supreme Court in its interpretation of the Sherman law.

I should have said this possibly at the outset, that it might be considered by an appellate court as having been a better practice, a more approved practice, had I overruled this motion and let the defendant offer its case and I am not inclined to disagree with that under ordinary circumstances, but I believe that it is the duty of the court when it is convinced of the correctness of a decision, to make it at the time and not to look to an expedient. This litigation is expensive on these plaintiffs, it is expensive on the defendants, and I feel that there is sufficient record here on which to draw the deductions both in law and from the evidence to sustain my decision.

FINDINGS OF FACT

1. Plaintiff Crawford Transport Company, Incorporated (hereinafter called "Crawford") is a corporation duly organized and existing under and by virtue of the laws of the state of West Virginia, with its principal place of business at Ashland, Kentucky. It is a common carrier by motor vehicle certificated by the Interstate Commerce Commission, with rights, among others, to transport in interstate commerce new automobiles, new trucks and new automobile and truck chassis in initial movements from points in and near Detroit, Michigan to points in Ohio, Kentucky, West Virginia and North Carolina. Crawford and its predecessors in interest have been engaged in the automobile carrier business since 1931. Its principal customer has been Chrysler Corporation.

2. Defendant Chrysler Corporation (hereinafter called "Chrysler") is a corporation duly organized and existing under and by virtue of the laws of the state of Delaware with its principal place of business at Detroit, Michigan. It is engaged in the business of manufacturing and assembling at and near Detroit, Michigan, various products, including principally new automobiles and trucks and new automobile and truck chassis, which products are transported by common carriers by rail, boat, truck and combinations thereof to dealers in Chrysler products throughout the country for ultimate sale to the public.

3. Defendant Commercial Carriers, Inc. (hereinafter called "Commercial") is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business at Romulus, Michigan. It is a wholly-owned subsidiary of American Commercial Barge Line Company, a publicly held Delaware corporation engaged in business as a water carrier on the inland water ways of the United States. It is a common

carrier certificated by the Interstate Commerce Commission. In May, 1957, Commercial's operating authority included authority to make initial movements of new automobiles, new trucks and new automobile and truck chassis from points in and near Detroit, Michigan, to seventeen states, primarily in the south, and parts of two other states. At that time, and to the present, Commercial was and has been a motor carrier authorized by the Interstate Commerce Commission to make direct line shipments of motor vehicles from Detroit, Michigan, to Alabama, Mississippi, Tennessee, Louisiana, Arkansas, Kentucky and Georgia. Its principal customers have been Chrysler and the Cadillac Division of General Motors Corporation.

4. For many years prior to November 1, 1956, Chrysler sold its vehicles to approximately 6,000 dealers in its products throughout the United States with each of whom Chrysler entered into a direct sales agreement. On and after February, 1952, the direct sales agreement with each dealer contained provisions which permitted Chrysler to ship its vehicles to the dealer freight prepaid, and by whatever means of transportation and carrier Chrysler might select. The direct sales agreement also provided that the vehicles be paid for in full by the dealer before shipment and that title to the vehicles remained in Chrysler until paid for in full. Though the direct sales agreement from 1952 to date has been modified from time to time, the substance of these provisions has not been changed except that in 1957 the direct sales agreement also expressly provided for the passing of title to the dealer upon delivery of the vehicle to the dealer, the dealer's agent, or the carrier.

5. Prior to November, 1954, Chrysler did not exercise the right reserved to it in the direct sales agreement to select the means of transportation and carrier for the delivery of its vehicles to its dealers nor did it exercise its

right to prepay the freight thereon. Prior to November, 1954, Chrysler permitted its dealers to make their own arrangements for the transportation of the vehicles from the factory to the dealer's place of business and to pay directly whatever freight charges were involved.

6. In November, 1954, Chrysler put into effect a policy under which it exercised its right under its sales agreements to select the method by which its vehicles would be transported to its dealers, to select the common carriers to be used to transport the vehicles and to prepay the freight charged by the common carriers. The dealers thereupon ceased making their own arrangements with the carriers for the transportation of the vehicles. Under this policy Chrysler, however, followed a practice of honoring requests from its dealers, when not inconsistent with operational efficiency, as to the mode of transportation and the particular carrier to be used, with the result that carriers solicited Chrysler business not only from Chrysler direct but indirectly through its dealers as well.

7. There is no evidence that Chrysler exercised its contractual right to select the method by which its vehicles would be transported to its dealers, to select the common carriers to be used to transport the vehicles and to prepay the freight charged by the common carriers either in an attempt to monopolize the business of transporting new motor vehicles in interstate commerce or as a result of or pursuant to any contract, combination, agreement, understanding or conspiracy with Commercial or any other carrier, or anyone else.

8. Chrysler did not combine, conspire or enter into any contract, agreement, understanding or concert of action with Commercial or any other carrier or with anyone else to exercise its contractual right to select the method by which its vehicles would be transported to its dealers, to select the common carriers to be used to transport the

vehicles and to prepay the freight charged by the common carriers.

9. There is no evidence that Chrysler's exercising its contractual right to select the method by which its vehicles would be transported to its dealers, to select the common carriers to be used to transport the vehicles and to prepay the freight charged by the common carriers unreasonably restrained trade in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to any other point in the United States.

10. Chrysler's exercise of its contractual right to select the method by which its vehicles would be transported to its dealers, to select the common carriers to be used to transport the vehicles and to prepay the freight charged by the common carriers did not unreasonably restrain trade in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to any other point in the United States and Chrysler did not thereby attempt to monopolize such trade.

11. In the period from November, 1954, to February, 1956, Chrysler charged its dealers the actual freight costs incurred in the transportation of vehicles. In February, 1956, Chrysler instituted and thereafter continued in effect a destination charge program.

12. There is no evidence that Chrysler contrary to law instituted or carried on its destination charge program either in an attempt to monopolize the business of transporting new motor vehicles in interstate commerce or as a result of or pursuant to any contract, combination, agreement, understanding or conspiracy with Commercial or any other carrier or with anyone else.

13. Chrysler did not unlawfully combine or conspire or enter into any agreement, understanding or concert of action with Commercial or any other carrier or with any-

one else to institute or carry out its destination charge program.

14. There is no evidence that Chrysler's instituting or carrying out its destination charge program unreasonably restrained trade in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to any other point in the United States.

15. Chrysler's instituting and carrying out of its destination charge program did not unreasonably restrain trade in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to any other point in the United States and Chrysler did not thereby attempt to monopolize such trade.

16. In September, 1956, Chrysler Motors Corporation (hereinafter called "Motors") was organized and incorporated as a wholly-owned sales and marketing subsidiary of Chrysler under the laws of the state of Delaware and commenced its operations on or about November 1, 1956. On or about November 1, 1956, Chrysler entered into an agreement with Motors under which Chrysler assigned to Motors all its direct sales agreements with dealers throughout the United States and agreed to sell to Motors and to deliver to Motors' dealers all vehicles produced for domestic retail sale.

17. Under the agreement with Motors, Chrysler retained the right to prepay the freight on vehicles sold to Motors and shipped to Motors' dealers and to select the means of transportation and the carrier. Thereafter, Chrysler continued to exercise exclusive control over the transportation of its products to dealers. Motors never shipped to its dealers the new motor vehicles it sold to them.

18. Plaintiff does not allege, nor is there any evidence, the Chrysler's policies with respect to its direct sales agreements with its dealers or with respect to the exercise by

Chrysler of the rights reserved to it under these agreements as described in findings 4, 5, 6 and 11, or that Chrysler's arrangements with Motors as described in findings 16 and 17, were adopted by Chrysler, or were followed by it prior to its adoption of the carrier retention program, as a result of or pursuant to any contract, combination, agreement, understanding or conspiracy with Commercial.

19. Chrysler is not engaged in the business of transporting new vehicles in interstate commerce. Chrysler ships its vehicles to approximately 6,000 dealers located throughout the United States by common carriers by rail, boat, truck and combinations thereof. Since at least November, 1954, and up to September, 1957, the great bulk of such shipments have been by common carriers by motor vehicle, including plaintiff Crawford, as such, and defendant Commercial. These common carriers are certified by the Interstate Commerce Commission under Certificates of Public Convenience and Necessity with rights to engage in interstate transportation of new motor vehicles by truck from certain specified points of origin to certain specified points of destination. Many of these common carriers, including plaintiff Crawford and defendant Commercial, participate in the agency tariffs published by the National Automobile Transporters Association, an association of automobile carriers. Such rates are filed with and approved by the Interstate Commerce Commission and are the rates charged to any automobile shipper for the transportation of its products.

20. In 1955 Chrysler's Director of Traffic commenced a study and analysis of Chrysler's transportation practices to determine whether any changes therein would result in a more efficient and economical distribution of Chrysler's products. In a preliminary proposal entitled "A Suggested Plan for the Reduction of the Number of Trucking Companies Serving Chrysler Corporation in the Middle West",

dated September 21, 1956, the Director of Traffic recommended that Chrysler reduce from 35 to 3 the number of common carriers by motor vehicle to whom it tendered traffic into the states of Wisconsin, Iowa, Missouri, Illinois, Indiana, Michigan, Ohio, West Virginia, and the western portions of New York, Pennsylvania and Maryland. The proposal also recommended that a similar carrier reduction plan be put into effect in the remainder of the United States as soon as possible.

21. In a second and more comprehensive proposal entitled "Outbound Transportation, Automobiles—Trucks", dated November 21, 1956, Chrysler's Director of Traffic presented a detailed recommendation that Chrysler reduce from 83 to no more than 20 the number of common carriers by motor vehicle to whom it tendered traffic into all parts of the United States. His proposal contained an analysis of the transportation problems created by Chrysler's current use of a large number of motor carriers varying greatly in size and in the scope of their certified rights and noted the competitive advantages enjoyed by General Motors Corporation and Ford Motor Company through their using only 14 and 16 motor carriers, respectively. The proposal also contained a recommendation as to the particular motor carriers that Chrysler should continue to use and included plaintiff Crawford among them.

22. In preparing his proposals of September 21, 1956, Chrysler's Director of Traffic discussed with many of the motor carriers then serving Chrysler the improvements that Chrysler could anticipate in the distribution of its products through reducing the number of carriers to whom it tendered its traffic and the possibility that such a reduction would result in lower operating costs for the selected carriers and thus ultimately result in savings in freight costs to Chrysler. These discussions constituted proper attempts by responsible Chrysler executives to obtain information

relating to the formulation of Chrysler's transportation policies which could only be obtained from the carriers then serving Chrysler. There is no evidence that any of the carriers, including Commercial, with whom these discussions were held had any part in the formulation of the proposal of September 21, 1956 or the subsequent proposal of November 21, 1956 other than to supply the information requested of them.

23. On January 9, 1957, the Group Executive at Chrysler, to whom the Director of Traffic reported, presented to Chrysler's Administrative Committee, a high policy making body, a proposal that Chrysler reduce to 16 the number of motor carriers to whom Chrysler tendered traffic and that the Central Traffic Department be authorized to select the motor carriers to be retained on the basis of past performance, growth potential, financial stability, freedom from competitive alliances and adequacy of certified rights. The proposal to the Administrative Committee further recommended the absorption of the unstable carriers by others capable of and willing to absorb. The Administrative Committee approved the proposal.

24. There is no evidence that Chrysler undertook its program to reduce the number of motor carriers to whom it tendered traffic by reason of or pursuant to any unlawful contract, combination, agreement, understanding or conspiracy with defendant Commercial or with any other individual or corporation.

25. Chrysler's decision to reduce the number of motor carriers to whom it tendered traffic was a unilateral one made by it for the sole purpose of obtaining a more efficient and economical distribution of its products and was not made as a part of or pursuant to any unlawful contract, combination, agreement, understanding or conspiracy with defendant Commercial or with any other individual or corporation.

26. There is no evidence that Chrysler undertook its program to reduce the number of motor carriers to whom it tendered traffic in an attempt to monopolize trade in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to any other point in the United States.

27. Chrysler's decision to reduce the number of motor carriers to whom it tendered traffic was not made in an attempt to monopolize trade in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to any other point in the United States.

28. On May 17, 1957 Chrysler held a meeting in Detroit, Michigan, which was attended by representatives of common carriers then transporting Chrysler vehicles from Detroit and at which Chrysler announced that it intended to reduce the number of common carriers to which it tendered traffic. At this meeting Chrysler presented in detail the proposed changes in its traffic policy and the reasons therefor, and described the five criteria approved by Chrysler's Administrative Committee, upon which each carrier then serving Chrysler would be evaluated to determine whether or not it would be a "retained" or a "non-retained" carrier under the new program. Chrysler also announced that individual discussions in connection with this program would be held with representatives of each carrier at which time each carrier would be advised whether Chrysler would continue to tender traffic to it commencing with the shipment of the 1958 model automobiles in September of 1957.

29. On or about June 20, 1957 Chrysler notified plaintiff Crawford that Chrysler would no longer tender traffic to it commencing with the shipment of 1958 model vehicles. From May 17, 1957 to July 17, 1957 approximately 50 other common carriers were similarly notified

by Chrysler. On or about June 27, 1957 Chrysler notified defendant Commercial that Chrysler would continue to tender traffic to it. Approximately 15 other common carriers were similarly notified by Chrysler.

30. At the meeting between representatives of Chrysler and Commercial at which Commercial was notified that it would continue to receive traffic from Chrysler, the Chrysler representatives indicated in general terms the volume of Chrysler traffic which Commercial might expect to receive during shipment of Chrysler's 1958 models. Commercial was disappointed in this indicated volume of traffic and attempted by letter, apparently unsuccessfully, to persuade Chrysler to increase its proposed allocation of traffic to Commercial. This letter, and the other discussions between Commercial and Chrysler as to which any evidence was introduced, constituted nothing more than attempts by a single carrier, acting unilaterally, to compete with other carriers with duplicating operating rights by solicitation of additional business from a shipper.

31. There is no evidence of any concerted action by Commercial with any other carrier, "retained" or "non-retained" with respect to Chrysler's adoption of its program to reduce the number of carriers to whom it would tender traffic, the selection by Chrysler of the carriers to whom Chrysler would continue to tender traffic or the allocation by Chrysler of its traffic to the carriers serving it, nor is there any evidence to support a finding of any horizontal contract, combination, agreement, understanding or conspiracy between Commercial or any other carrier "retained" or "non-retained" with respect to the adoption or implementation by Chrysler of its carrier reduction program.

32. There is no evidence that Chrysler's decision to no longer tender traffic to Crawford and other "non-retained" carriers and to continue to tender traffic to Commercial

and certain other "retained" carriers was the result of or pursuant to any contract, combination, agreement, understanding or conspiracy with Commercial or other "retained" carriers, or Motors or any other individual or corporation.

33. Chrysler's decision to no longer tender traffic to Crawford and other "non-retained" carriers and to continue to tender traffic to Commercial and certain other "retained" carriers was a unilateral one, made by it for the sole purpose of obtaining a more efficient and economical distribution of its products and was not made as a part of or pursuant to any contract, combination, agreement, understanding or conspiracy with Commercial or other "retained" carriers or Motors or any other individual or corporation.

34. There is no evidence that the purpose or effect of Chrysler's decision to no longer tender traffic to Crawford and other "non-retained" carriers and to continue to tender traffic to Commercial and certain other "retained" carriers and the implementation of that decision unreasonably restrained trade in the business of transporting new motor vehicles from points of manufacture or assembly in or near Detroit, Michigan, to any other point in the United States, or that Chrysler thereby attempted to monopolize such trade.

35. Chrysler's decision to no longer tender traffic to Crawford and other "non-retained" carriers and to continue to tender traffic to Commercial and certain other "retained" carriers and the implementation of that decision did not unreasonably restrain trade in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to any other point in the United States, and Chrysler did not thereby attempt to monopolize such trade.

36. Between June 27, 1957 and July 8, 1957 Crawford, Dixie Transport Company, Inc. (hereinafter called "Dixie")

and several other common carriers by motor vehicle with Interstate Commerce Commission rights into the southeastern part of the United States held numerous discussions and meetings at which they generally agreed to form a new corporation under the name of Southern Transport, Inc. (hereinafter called "Southern") and to sell to it their respective operating rights and to make available to it their operating equipment in the hope that such new corporation having broad Interstate Commerce Commission rights would be tendered traffic by Chrysler. On or about July 8, 1957 Chrysler notified the participants in the proposed new corporation that if Southern should be incorporated as proposed and receive temporary authority from the Interstate Commerce Commission and to operate as a common carrier before the commencement of shipment of Chrysler's 1958 models, Chrysler would consider tendering traffic to it as a "retained" carrier.

37. In the summer of 1957, Commercial acquired all of the stock of Auto Express, Inc., a small carrier which held direct line operating rights from Detroit, Michigan, to the State of Florida. Auto Express, Inc. was a "non-retained" carrier. Commercial, which did not have such direct line authority from Detroit, Michigan, to Florida, had begun negotiations for the purchase of Auto Express, Inc. in 1954 after representatives of the Cadillac Division of General Motors Corporation had suggested that Commercial obtain direct line authority to Florida. In the fall of 1956, representatives of Chrysler also suggested that Commercial, which had been hauling Chrysler vehicles to Florida by a combined truck-barge-truck route, "round out" its authority by obtaining direct line rights to that state through the purchase of Auto Express, Inc. The evidence indicates that the price paid by Commercial for the stock of Auto Express, Inc. was fair and the acquisition and

subsequent merger of Auto Express, Inc. into Commercial was approved by the Interstate Commerce Commission.

38. On July 17, 1957 Chrysler held a meeting in Detroit, Michigan, with representatives of the "retained" carriers to announce its traffic policies for the 1958 model vehicle shipments. Representatives of the proposed Southern including Mr. Sam Crawford, Vice President of plaintiff Crawford, were invited and attended the meeting. At the meeting Chrysler again announced as it had at the meeting on May 17, 1957, that it would no longer honor dealer requests as to carrier selection and that henceforth the "retained" carriers would be expected to solicit Chrysler business from Chrysler alone and to cease soliciting such business through solicitation of its dealers. It distributed to the representatives present, maps of the country showing the areas thereof into which, commencing with the shipment of its 1958 models, Chrysler planned to tender traffic to particular carriers, including Southern, based on each carrier's destination territories as fixed by the Interstate Commerce Commission. In announcing its proposed allocation of traffic to individual carriers, Chrysler emphasized that these were intended only as indications of Chrysler's present intent and that Chrysler would from time to time make such changes in its traffic policies as it might deem appropriate. During the meeting Chrysler expressed the hope and expectation that the "retained" carriers would not increase their rates, would use Dodge trucks in the transporting of Chrysler made vehicles and would not enter into interchange agreements relating to Chrysler traffic with carriers who were not "retained" carriers without Chrysler's written approval.

39. Commercial was notified by Chrysler at the July 17 meeting that, among other traffic, Chrysler intended to tender to Commercial all of its traffic to the state of Kentucky. A portion of the traffic to the eastern portion of

Kentucky had been tendered to plaintiff Crawford during the model year 1957 and prior model years (virtually all Chrysler traffic to the western portion of Kentucky had been tendered to Commercial in the model year 1957 and in prior years because Commercial had been the only carrier with direct line authority from Detroit to such area). Although temporary approval had been granted by the Interstate Commerce Commission for Commercial's acquisition by merger of the direct line operating rights of Auto Express, Inc. into the state of Florida, Chrysler announced that all of its direct line traffic into that state during the model year 1958 would be tendered to Southern and that Commercial would not participate in such traffic. There is no evidence from which it can be determined whether the traffic which Chrysler at the July 17 meeting announced that it would tender to Commercial, or which it in fact tendered to Commercial thereafter was a larger or smaller percentage of the Chrysler traffic from Detroit or of Chrysler traffic from all Chrysler plants, than Commercial had enjoyed during the 1957 model year or prior model years.

40. There is no evidence that Chrysler solicited an agreement from any of the "retained" carriers to hold the line on rates, to use Dodge trucks or to refrain from interlining or entering into leasing arrangements with "non-retained" carriers or with Crawford or threaten to or imposed any sanctions for non-compliance with its announced policy.

41. There is no evidence that Commercial or any other "retained" carrier entered into any contract, combination, agreement, understanding or conspiracy with Chrysler to hold the line on rates, to use Dodge trucks or to refrain from interlining or entering into leasing arrangements with "non-retained" carriers or with Crawford.

42. Chrysler did not enter into any contract, combination, agreement, understanding or conspiracy with any "re-

tained" carrier under which Chrysler made territorial allocations of its business among the "retained" carriers or under which any "retained" carrier agreed to use Dodge trucks in the transporting of Chrysler made vehicles or to refrain from interlining or entering into leasing arrangements with "non-retained" carriers or with Crawford or to hold the line on rates and Chrysler did not solicit an agreement or understanding from any of the "retained" carriers on these matters nor did it threaten to or impose any sanctions for non-compliance with its announced policy.

43. Southern was organized in August, 1957. In the beginning of October, 1957, the Interstate Commerce Commission granted to Southern temporary operating authority into certain states in the southeastern part of the United States. Thereupon Chrysler tendered traffic to Southern for shipment of its 1958 model vehicles to points of destination in the states of Florida, Georgia, North Carolina and South Carolina and continued to do so for that entire model year.

44. In exchange for the operating rights it transferred to Southern, plaintiff Crawford received a 19% interest in all the outstanding voting stock of Southern. Southern leased from Crawford and the other participating carriers their operating equipment under terms of payment approved by the Interstate Commerce Commission, and Southern used Crawford's equipment to transport in interstate commerce Chrysler's 1958 model vehicles in accordance with an agreement under which the stockholders of Southern allocated among themselves the traffic that Chrysler tendered to Southern. In August of 1958, Southern went out of business.

45. Plaintiff does not allege, nor was there any evidence that Commercial participated in or was in any way involved in the formation, operation or dissolution of Southern.

CONCLUSIONS OF LAW

1. The evidence as a whole does not support the controverted allegations of the Complaint.

2. Defendant Chrysler did not combine, conspire or enter into any contract, agreement, understanding or concert of action with defendant Commercial, the other alleged co-conspirator, or any other individual or corporation to restrain trade or to eliminate competition in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to points of destination throughout the United States or to the states of Ohio, West Virginia, Kentucky and North Carolina in violation of Section 1 of the Sherman Act.

3. Defendant Commercial did not combine, conspire or enter into any contract, agreement, understanding or concert of action with defendant Chrysler, the other alleged co-conspirators, or any other individual or corporation to restrain trade or to eliminate competition in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to points of destination throughout the United States or to the states of Ohio, West Virginia, Kentucky and North Carolina in violation of Section 1 of the Sherman Act.

4. Defendant Chrysler did not attempt to monopolize or combine or conspire or enter into any contract, agreement, understanding or concert of action with defendant Commercial, the other alleged co-conspirators, or any other person or persons to monopolize trade or commerce in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to points of destination throughout the United States or to the states of Ohio, West Virginia, Kentucky and North Carolina in violation of Section 2 of the Sherman Act.

5. Defendant Commercial did not attempt to monopolize or combine or conspire or enter into any contract, agreement, understanding or concert of action with defendant Chrysler, the other alleged co-conspirators, or any other person or persons to monopolize trade or commerce in the business of transporting new motor vehicles from points of manufacture or assembly in and near Detroit, Michigan, to points of destination throughout the United States or to the states of Ohio, West Virginia, Kentucky and North Carolina in violation of Section 2 of the Sherman Act.

6. No violation of Section 1 of the Sherman Act has been shown.

7. No violation of Section 2 of the Sherman Act has been shown.

8. Plaintiff has shown no right to relief upon the facts and law, and defendant Chrysler's timely motion for dismissal and defendant Commercial's timely motion for dismissal, under Rule 41(b) of the Federal Rules of Civil Procedure are granted, and judgment in favor of the defendants shall be entered in accordance with these findings of fact and conclusions of law.

No. 15307

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CRAWFORD TRANSPORT COMPANY, INCORPORATED,
Plaintiff-Appellant,

vs.

CHRYSLER CORPORATION and COMMERCIAL CARRIERS, INCORPORATED,
Defendant-Appellees.

(Filed November 13, 1964)

Before: WEICK, Chief Judge, CECIL, Circuit Judge, and PECK, District Judge.

The motion for rehearing herein is denied.

Entered by order of the Court.

/s/ CARL W. REUSS, Clerk

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IN THE

Supreme Court of the United States

October Term, 1964

No. 888

CRAWFORD TRANSPORT COMPANY, INCORPORATED,

Petitioner,

v.

CHRYSLER CORPORATION and CHRYSLER COMMERCIAL CARRIERS INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT CHRYSLER CORPORATION IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1964

No. 888

CRAWFORD TRANSPORT COMPANY, INCORPORATED,

Petitioner,

v.

CHRYSLER CORPORATION and ~~CHRYSLER~~ COMMERCIAL CARRIERS INCORPORATED,

Respondents.

BRIEF FOR RESPONDENT CHRYSLER CORPORATION IN OPPOSITION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent Chrysler Corporation hereby submits its brief in opposition to the Petition for Writ of Certiorari filed herein on February 8, 1965.

Questions Presented

1. Whether it is *per se* a restraint of the trade of transporting new automobiles by truck in violation of Section 1 of the Sherman Act for an automobile manufacturer in order to obtain a more efficient and economical distribution of its product, to sell its product nationally only on condition that, prior to the transfer of title to the purchaser, the manufacturer

alone selects the means by which and the common carrier by whom the new automobile is to be transported to the purchasing dealer, prepays the freight and collects from the purchaser a destination charge based on both the actual freight cost and the comparable charge made by the manufacturer's competitors to their dealers in the purchaser's area.

2. Whether the Court of Appeals erred in holding that the evidence supported the trial judge's findings that the respondents did not attempt to monopolize or combine or conspire to monopolize or to restrain the trade of transporting new automobiles in violation of Sections 1 or 2 of the Sherman Act.

Statement

Respondent, Chrysler Corporation (hereinafter sometimes called "Chrysler"), a manufacturer of motor vehicles, has for many years marketed its products to and through a system of Direct Dealers with each of whom Chrysler entered into a Direct Dealer Agreement. As early as February, 1952 the standard form of Direct Dealer Agreement not only gave Chrysler the sole power to determine the means and manner of delivering vehicles purchased by the dealer but also permitted Chrysler to prepay the freight and to bill the dealer for a transportation charge in addition to the sales price of the vehicle (R. 103a; 838a). However, prior to November, 1954, Chrysler sold its vehicles to its dealers F.O.B. point of manufacture or assembly and the dealers were billed by and paid to the carriers all freight costs (R. 31a). During this period, common carriers in

the business of transporting new motor vehicles competed with each other for the business of transporting Chrysler vehicles into the areas for which they were certificated by the Interstate Commerce Commission. They did so not only by soliciting the dealers who purchased the vehicles and paid the freight bills but also by actively soliciting Chrysler, the manufacturer and shipper of the vehicles (R. 735a).

In November, 1954, Chrysler changed the terms and conditions under which it sold its vehicles to its dealers by exercising its right under the Dealer Agreement to sell on a "freight prepaid" basis (R. 104a). Thereafter the carriers transporting Chrysler vehicles to the dealers billed the freight costs to and received payment from Chrysler. Chrysler, in turn, billed the cost of the freight to the dealer at the same time that it billed the price of the vehicle itself. Under this arrangement Chrysler exercised its contractual right to select the method of transporting the vehicles it sold to its dealers, to choose the carriers to be employed in such transportation and to pay to the carriers and collect from its dealers the freight costs involved (R. 105-106a). However, Chrysler followed a practice of honoring requests from its dealers, when not inconsistent with operational efficiency, as to the mode of transport and the particular carrier to be used (R. 104a).

In February, 1956, Chrysler ceased attempting to charge and collect from its dealers the actual freight cost involved in each shipment and instead began billing its dealers a "destination charge", that is, a charge made for delivering the vehicles to the deal-

ers (R. 816a). This charge would vary from area to area and between different model vehicles and the fixing of each charge depended upon considering not only Chrysler's freight costs but also the destination charges made by General Motors Corporation and Ford Motor Company for delivering comparable products into the same market area (R. 820-822a). With respect to the selecting of particular carriers Chrysler continued its practice of honoring dealers' requests when not inconsistent with operational efficiency.

In September, 1956, Chrysler organized and incorporated under Delaware law a wholly-owned sales subsidiary, Chrysler Motors Corporation (hereinafter sometimes called "Motors"). On or about November 1, 1956, Chrysler entered into an agreement with Motors under which Chrysler assigned to Motors all its direct sales agreements with dealers throughout the United States and agreed to sell to Motors and to deliver to Motors' dealers all vehicles Chrysler manufactured and assembled for domestic retail sale (R. 106-107a). Under this agreement Chrysler retained the right to prepay the freight on vehicles it sold to Motors and shipped to Motors' dealers. Chrysler also retained the right to select the means and the carrier to be used in transporting vehicles to Motors' dealers (R. 107a).

Motors has not, at any time, taken any part in shipping to its dealers the vehicles it sells to them (R. 107a).

Throughout a period beginning prior to 1952 and continuing through 1956 Petitioner (hereinafter some-

times called "Crawford") a common carrier by motor vehicle certificated by the Interstate Commerce Commission with rights to transport new automobiles from Detroit to portions of Kentucky, West Virginia and North Carolina solicited and was tended traffic by Chrysler for delivery to Chrysler dealers in the areas in which it had destination rights. In soliciting such business Crawford competed with approximately 9 other common carriers each of whose destination territory to some degree overlapped Crawford's (R. 136-137a). Chrysler tendered traffic to all of them (R. 463-472a).

During the year 1956 Chrysler's Director of Traffic submitted to his supervisors two studies and analyses of Chrysler's transportation practices and their effect on Chrysler's competitive position as an automobile manufacturer. Based on these studies the Group Executive, to whom the Director of Traffic reported, presented to Chrysler's Administrative Committee a proposal that in order to insure the timely and economical delivery of its products to dealers Chrysler reduce from 83 to 16 the number of common carriers to whom it tendered traffic from all its plants in the United States into all parts of the United States. This written proposal contained an analysis of the transportation problems created by Chrysler's current use of a large number of common carriers by motor vehicle varying greatly in size, efficiency and financial soundness and the competitive advantages enjoyed by General Motors Corporation and Ford Motor Company through their use of only 14 and 16 motor carriers, respectively. The proposal requested that the Central Traffic Department be authorized to select the motor carriers to be retained on the basis of past

performance, growth potential, financial stability, freedom from alliances with other automobile manufacturers and adequacy of certificate rights and detailed the advantages that would result from such a program (R. 521-532a). The Administrative Committee approved the proposal (R. 633a).

On May 17, 1957 Chrysler held a meeting in Detroit, Michigan, which was attended by representatives of all the common carriers then transporting Chrysler vehicles from Detroit and at which Chrysler announced that it intended to reduce the number of common carriers to which it tendered traffic. At this meeting Chrysler presented in detail the proposed changes in its traffic policy and the reasons therefor, and described the five criteria approved by Chrysler's Administrative Committee, upon which each carrier then serving Chrysler would be evaluated to determine whether it would be a "retained" or a "non-retained" carrier under the new program. Chrysler also announced that individual discussions in connection with this program would be held with representatives of each carrier at which time each carrier would be advised whether Chrysler would continue to tender traffic to it commencing with the shipment of the 1958 model automobiles in September of 1957 (R. 110-111a; 430-445a).

On or about June 20, 1957, Chrysler notified Crawford, that Chrysler would no longer tender traffic to it commencing with the shipment of 1958 model vehicles. From May 17, 1957 to July 17, 1957, approximately 50 other common carriers were similarly notified by Chrysler. On or about June 27, 1957, Chrysler notified respondent, Commercial Carriers,

Inc. (hereinafter sometimes called "Commercial"), that Chrysler would continue to tender traffic to it. Approximately 15 other common carriers were similarly notified by Chrysler (R. 111a).

At the meeting between representatives of Chrysler and Commercial at which Commercial was notified that it would continue to receive traffic from Chrysler, the Chrysler representatives indicated in general terms the volume of Chrysler traffic which Commercial might expect to receive during shipment of Chrysler's 1958 models. Commercial was disappointed in this indicated volume of traffic and attempted by letter, apparently unsuccessfully, to persuade Chrysler to increase its proposed allocation of traffic to Commercial (R. 111a).

Between June 27, 1957 and July 8, 1957 Crawford, Dixie Transport Company, Inc. (hereinafter called "Dixie") and several other "non-retained" common carriers by motor vehicle with Interstate Commerce Commission rights into the southeastern part of the United States held numerous discussions and meetings at which they generally agreed to form a new corporation under the name of Southern Transport, Inc., (hereinafter called "Southern") and to sell to it their respective operating rights and to make available to it their operating equipment in the hope that such new corporation, having broad Interstate Commerce Commission rights, would be tendered traffic by Chrysler. On or about July 8, 1957, Chrysler notified the participants in the proposed new corporation that if Southern should be incorporated as proposed and receive temporary authority from the Interstate Commerce Commission to operate as a common carrier

before the commencement of shipment of Chrysler's 1958 models, Chrysler would consider tendering traffic to it as a "retained" carrier (R. 113-114a; 533-541a).

On July 17, 1957, Chrysler held a meeting in Detroit, Michigan, with representatives of the "retained" carriers to announce its traffic policies for the 1958 model vehicle shipments. Representatives of the proposed Southern, including Mr. Sam Crawford, Vice President of petitioner Crawford, were invited and attended the meeting. At the meeting Chrysler again announced, as it had at the meeting on May 17, 1957, that it would no longer honor dealer requests as to carrier selection and that henceforth the "retained" carriers would be expected to solicit Chrysler business from Chrysler alone and to cease soliciting such business through solicitation of Chrysler dealers. It distributed to the representatives present, maps of the country showing the areas thereof into which, commencing with the shipment of its 1958 models, Chrysler planned to tender traffic to particular carriers, including Southern, based on each carrier's destination territories as fixed by the Interstate Commerce Commission. In announcing its proposed allocation of traffic to individual carriers, Chrysler emphasized that these were intended only as indications of Chrysler's present intent and that Chrysler would from time to time make such changes in its traffic policies as it might deem appropriate. During the meeting Chrysler expressed the hope and expectation that the "retained" carriers would not increase their rates, would use Dodge trucks in the transporting of Chrysler made vehicles and would not enter into interchange agreements relating to Chrysler traffic with

carriers who were not "retained" carriers without Chrysler's written approval (R. 114-115a; 336-351a).

Chrysler notified Commercial at the July 17 meeting that, among other traffic, Chrysler intended to tender to Commercial all of its traffic to the state of Kentucky commencing with the shipment of its 1958 models. In 1957 and in prior model years, Chrysler had tendered to Crawford a portion of its traffic into eastern Kentucky but had given to Commercial virtually all its traffic into western Kentucky, since Commercial was the only common carrier with direct line authority into such area from Detroit (R. 115a). Although temporary approval had been granted by the Interstate Commerce Commission for Commercial's acquisition by merger of the direct line operating rights of Auto Express, Inc., into the state of Florida, Chrysler announced that all of its direct line traffic into that state during the model year 1958 would be tendered to Southern and that Commercial would not participate in such traffic (R. 115a).

Southern was organized in August, 1957. In the beginning of October, 1957, the Interstate Commerce Commission granted to Southern temporary operating authority into certain states in the southeastern part of the United States. Thereupon Chrysler tendered traffic to Southern for shipment of its 1958 model vehicles to destination points in the states of Florida, Georgia, North Carolina and South Carolina and continued to do so for that entire model year (R. 116-117a).

In exchange for the operating rights it transferred to Southern, petitioner Crawford received a 19% in-

terest in all the outstanding voting stock of Southern. Southern leased from Crawford and the other participating carriers their operating equipment under terms of payment approved by the Interstate Commerce Commission, and Southern used Crawford's equipment to transport in interstate commerce Chrysler's 1958 model vehicles in accordance with an agreement under which the stockholders of Southern allocated among themselves the traffic that Chrysler tendered to Southern.

After Chrysler's new traffic program was put into effect Chrysler continued to tender traffic directly to 4 of Crawford's 9 competitors (R. 136-137a; 533-541a). Three other competitors together with Crawford, though "non-retained" carriers, continued to participate in Chrysler traffic as a part of Southern Transport (R. 334-336a).

In August of 1958, at the end of Chrysler's 1958 model year, Southern went out of business (R. 117a).

Thereafter Crawford commenced this action against respondents.

ARGUMENT

In arguing that the decision of the Court of Appeals, which petitioner here asks this Court to review, contravenes *International Salt Co.* v. *United States,* 332 U.S. 392 (1947) and *Northern Pacific Ry.* v. *United States,* 356 U.S. 1 (1958), petitioner attempts to distort the *ratio decidendi* of the opinions in those cases and to make their principles applicable to every

arrangement under which separately saleable items are sold only in combination. This is to confuse the symptoms with the disease.

The perniciousness of the "tying" arrangements that this Court has condemned as *per se* violations of the Sherman Act lies not in the fact that two separate items are being sold together but, rather, in the seller's extending into a separate area of competition a competitive advantage gained in another and different line of commerce. In other words a tying arrangement becomes an unreasonable restraint of trade when it enables the seller to compete in the trade of the "tied" item on an advantageous basis as a result of his dominance in the "tying" item's market rather than because of free competitive forces in the "tied" item's market. In short, a tying arrangement of the type judicially condemned necessarily involves a seller who engages for profit in the business or market to which the "tied" item, as such, belongs.

Thus, in *Northern Pacific Ry.* v. *United States, supra,* the seller of the "tying" item, land, was primarily in the business of selling the "tied" item, transportation services. So also in *International Salt Co.* v. *United States, supra,* [salt tied to machines]; *United States* v. *Jerrold Electronics Corporation,* 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961) [service contracts tied to television equipment]; *Osborn v. Sinclair Refining Co.,* 286 F. 2d 832 (4th Cir. 1960) *cert. denied,* 366 U.S. 963 (1961) [auto accessories tied to lease of premises]; *United States* v. *General Motors Corp.,* 121 F. 2d 376 (7th Cir.), *cert. denied,* 314 U.S. 618 (1941) [financing services tied to automobiles], the seller, in each case,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 888

CRAWFORD TRANSPORT COMPANY, INCORPORATED,
Petitioner,

v.

CHRYSLER CORPORATION

and

COMMERCIAL CARRIERS, INCORPORATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT COMMERCIAL CARRIERS, INCORPORATED

This brief is filed by respondent Commercial Carriers, Incorporated ("Commercial") in opposition to the petition of Crawford Transport Company, Incorporated ("Crawford") for a writ of certiorari. The other respondent herein is Chrysler Corporation ("Chrysler"). The petition seeks review by this Court of a decision of the United

States Court of Appeals for the Sixth Circuit, reported in 338 F.2d 934, which unanimously affirmed the judgment of the United States District Court for the Eastern District of Kentucky (per Swinford, J.) dismissing, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, the complaint of Crawford against Chrysler and Commercial upon completion of Crawford's presentation of its evidence.

Questions Presented

Two questions are presented by the petition herein. Only one involves respondent Commercial. This question, as stated in the brief for Chrysler (Question 2 under the heading "Questions Presented", Brief for Respondent Chrysler), which statement we believe to be more precise than the statement thereof in the petition (Question 2 under the heading "Questions Presented", Petition, pp. 2-3), is as follows:

> Whether the Court of Appeals erred in holding that the evidence supported the trial judge's findings that the respondents did not attempt to monopolize or combine or conspire to monopolize or to restrain the trade of transporting new automobiles in violation of Sections 1 or 2 of the Sherman Act.

The other question presented, referred to by petitioner as the "principal question presented" (Petition, page 4), relates to plaintiff's charge that Chrysler violated Section 1 of the Sherman Act (15 U.S.C. §1) in that it "tied" the sale of transportation to the sale of its motor vehicles. Commercial is not involved in this aspect of the case and this brief will not attempt to deal with the issue raised thereby. Commercial, however, respectfully submits that

this issue was properly decided by the courts below and subscribes to the arguments in respect thereto presented in the brief for respondent Chrysler.

Statement

The facts herein are correctly stated in the brief for respondent Chrysler under the heading "Statement."

Reasons for Not Granting This Writ

Respondent Commercial submits that the writ sought by the petition, insofar as it relates to the only question in which Commercial is involved, should not be granted for the following reasons:

1. The petition seeks a review by this Court of findings of fact made by the trial court and unanimously affirmed by the Court of Appeals.

Insofar as this petition involves respondent Commercial, it seeks a review of the unanimous affirmance by the Court of Appeals of the factual determinations by the trial court that Chrysler's decision to exercise the right to select the carriers who would haul its motor vehicles to its dealers, to reduce the number of carriers to whom it would tender shipments of such vehicles, and to discontinue tendering such shipments to Crawford were unilateral decisions made by it for the sole purpose of obtaining a more efficient and economical distribution of its products and were not made as a part of or pursuant to any unlawful contract, combination, agreement, understanding or conspiracy with respondent Commercial. These determinations are embodied in Findings of Fact 7, 8, 12, 13, 18, 24,

25, 32, 33, 41 and 42 (Appendix B to the Petition, pages 50 *et seq.*).

These findings of fact were made by the trial court, to whom the action was tried without a jury, upon conclusion of Crawford's case as plaintiff. The trial had been preceded by extensive documentary discovery of Commercial and of Chrysler and exhaustive depositions of the officers and employees of Chrysler and of Mr. Ray Van Beckum, the president of Commercial during the period covered by the complaint. The presentation of the case extended over several weeks. The motion to dismiss by Chrysler and Commercial was exhaustively briefed and argued by the parties and the findings of fact were made by the trial court after submission of proposed findings of fact by the opposing parties referenced to the record.

These findings of fact were reviewed by the Court of Appeals, which unanimously concluded that:

> "The evidence supports these findings of fact. Neither the findings of basic facts nor the inferences drawn therefrom are clearly erroneous." (Appendix B to the Petition, p. 39)

This Court has stated that it cannot undertake to review "concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275. Petitioner has not made any such showing with respect to the findings of fact involving Commercial (see point 3, pp. 6-11, *infra*) and certiorari should not be granted with respect to them.

2. There is no conflict between the decision below and the decision of the Second Circuit in *Miller* v. *Commissioner*, 327 F.2d 846 (2d Cir. 1964).

Petitioner, in an attempt to find some basis for review by this Court, suggests that the decision of the court below conflicts with the decision of the Second Circuit in *Miller* v. *Commissioner*, 327 F.2d 846 (2d Cir. 1964), with respect to the test to be applied by a Court of Appeals in reviewing findings of fact made by the trial judge in a case tried to the court without a jury. Consideration of the two decisions in light of their facts shows that there is no real conflict between them.

The court below, citing *Commissioner* v. *Duberstein*, 363 U. S. 278, and *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 stated that it was "bound to accept the factual inferences drawn by a trial judge from undisputed basic facts, unless they are clearly erroneous" (Appendix B to Petition, p. 39). The position taken by the Second Circuit in *Miller* is not in conflict with this statement. In *Miller*, the Second Circuit was reviewing a decision of the Tax Court and the specific issue before it was whether specific transfers were gifts within the meaning of the Internal Revenue Code. The Second Circuit there held that because the "case below was tried on facts which were entirely stipulated, and the lower court's conclusions were based entirely on documentary evidence", it was properly entitled to exercise a scope of review broader than the "clearly erroneous" test. The holding of the Second Circuit is clearly limited to the unusual circumstances of that case. Those circumstances were not present in the instant case. The parties in this action did not stipulate the facts nor were the trial court's conclusions based entirely on documentary evidence.

The *Miller* decision is further distinguishable from the instant case in that it involved a comparatively simple fact situation. In the instant case, as in most cases involving charges of antitrust violations, there is a complex factual situation covering a wide time period. The ultimate facts must be derived from a complicated structure of basic facts established by or inferred from a large mass of testimony and documents. An appellate court, in such a case, cannot be expected to obtain the intimate familiarity of the trial court with the details and nuances of the evidence and necessarily must accord heavy weight to its determinations founded on this familiarity. *Cf. United States* v. *Oregon State Medical Society*, 343 U. S. 326.

Commercial submits that the court below applied the proper test in reviewing the findings of fact of the trial court and that the decision of the Second Circuit in *Miller* does not suggest that a different test should have been applied.*

3. Petitioner has not made "a very obvious and exceptional showing of error" in the findings of fact made by the trial court and affirmed by the Court of Appeals.

The half-hearted attempt of petitioner to establish that the findings of fact of the trial court which relate to or involve Commercial were "clearly erroneous" (Petition, pp. 20-23) is without substance; certainly petitioner has failed to make "a very obvious and exceptional showing of error" on the part of the courts below with respect to such findings.

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* It should also be noted that petitioner does not suggest, nor does the decision below in any way suggest, that the court below would have reached a different result if a more stringent test had been applied.

Petitioner's argument that a conspiracy existed between Chrysler and its subsidiary, Chrysler Motors Corporation with respect to Chrysler's adoption of its Carrier Retention Program (Petition, pages 20-21), is of course, irrelevant to the issue of whether Commercial was a participant in any conspiracy or combination with Chrysler.

Petitioner contends that Commercial "participated in the combination in proceeding with absorption of assets of non-retained carriers" and that such participation was an act "knowingly performed • • • to promote or aid in the attainment" of a known conspiracy (Petition, pages 21-22). The record shows that the only acquisition made by Commercial of a non-retained carrier or of the assets of such a carrier was its acquisition of the stock of Auto Express, Inc. There is no evidence that Commercial ever negotiated for or even considered any other such acquisition. With respect to the acquisition of Auto Express, Inc. it is sufficient merely to quote the findings of fact of the trial court with respect to such acquisition, findings which plaintiff cannot and does not attempt to refute. The trial court found as follows:

> "37. In the summer of 1957, Commercial acquired all of the stock of Auto Express, Inc., a small carrier which held direct line operating rights from Detroit, Michigan, to the State of Florida. Auto Express, Inc. was a 'non-retained' carrier. Commercial, which did not have such direct line authority from Detroit, Michigan, to Florida, had begun negotiations for the purchase of Auto Express, Inc. in 1954 after representatives of the Cadillac Division of General Motors Corporation had suggested that Commercial obtain direct line authority to Florida. In the fall of 1956, repre-

> sentatives of Chrysler also suggested that Commercial, which had been hauling Chrysler vehicles to Florida by a combined truck-barge-truck route, 'round out' its authority by obtaining direct line rights to that state through the purchase of Auto Express, Inc. The evidence indicates that the price paid by Commercial for the stock of Auto Express, Inc. was fair and the acquisition and subsequent merger of Auto Express, Inc. into Commercial was approved by the Interstate Commerce Commission." (Appendix B to Petition, pp. 61-62)
>
> • • •
>
> "Although temporary approval had been granted by the Interstate Commerce Commission for Commercial's acquisition by merger of the direct line operating rights of Auto Express, Inc. into the state of Florida, Chrysler announced that all of its direct line traffic into that state during the model year 1958 would be tendered to Southern [the carrier formed by Crawford and certain other non-retained carriers] and that Commercial would not participate in such traffic." (Finding of Fact 39, Appendix B to Petition, p. 63)

Petitioner's further contends that Commercial, in furtherance of the alleged conspiracy, adhered to the "policies of Chrysler prohibiting these retained carriers from dealing with non-retained carriers in leasing (interchange and interline) arrangements" (Petition, pages 21-22). The record is simply barren of evidence to support this contention.

Two record citations are given by petitioner in support of the contention, R. 348-349a and 383-384a. The first consists of a reference to a slide exhibited at the meeting of retention carriers called by Chrysler on July 17, 1957 in which Chrysler representatives expressed the wish that the retained carriers abstain from leasing and interline arrangements with non-retained carriers. It need hardly be said that proof of Chrysler's wish is not proof of

Commercial's act. The second is a reference to testimony by an employee of Chrysler that as far as he knew the retained carriers had not entered into such arrangements. This testimony has little weight in view of Crawford's failure, despite extensive pretrial discovery of Commercial, to show from the books and records of Commercial what Commercial's practice had been with respect to such arrangements either before or after adoption by Chrysler of its Carrier Retention Program. These books and records could have definitively established what Commercial actually did. They were available to Crawford. They were not sought or produced at trial by Crawford. Moreover, there was no testimony at trial by any representative of Crawford or any other non-retained carrier that they had solicited or inquired as to the possibility of entering into such arrangements with Commercial or any other retained carrier and had been refused.

In these circumstances, we submit that the following findings of fact by the trial court on this issue were supported by the evidence:

> "40. There is no evidence that Chrysler solicited an agreement from any of the 'retained' carriers to hold the line on rates, to use Dodge trucks or to refrain from interlining or entering into leasing arrangements with 'non-retained' carriers or with Crawford or threaten to or imposed any sanctions for non-compliance with its announced policy.
>
> "41. There is no evidence that Commercial or any other 'retained' carrier entered into any contract, combination, agreement, understanding or conspiracy with Chrysler to hold the line on rates, to use Dodge trucks or to refrain from interlining or entering into leasing arrangements with 'non-retained' carriers or with Crawford." (Appendix B to Petition, page 63.)

Petitioner also makes the general allegation that the "respondents' intention" was to "eliminate competition in the business of transporting new vehicles from Detroit and to eliminate non-retention carriers as competitors in such business through absorption of their assets by selected carriers" (Petition, pp. 22-23). This allegation is similarly without foundation in the record.

The record clearly demonstrates that Chrysler's intention was to exercise its right as a single trader to select the carriers to whom it would tender its traffic during the 1958 model year in an effort to obtain better transportation service at a reduced cost. It in no way obligated itself to anyone to continue to deal with the carriers selected even through the model year 1958 and expressly reserved the right to reallocate its traffic at any time (R. 338a-339a). Petitioner does not allege, nor is there any evidence in the record whatsoever to indicate that there was any understanding, or agreement, or even discussion, among the retained carriers as to allocation among themselves of Chrysler's traffic. On the contrary, the record is clear that Chrysler alone determined such allocation and the trial court so found (Finding of Fact 31, Appendix B to Petition, page 59).

Beyond this, the two reports of Chrysler personnel which petitioner cites in support of its allegation (R. 508-521a, R. 445-507a) speak for themselves. We submit they establish that Chrysler adopted its Carrier Retention Program in an attempt to emulate what it considered to be the more efficient traffic policies of its two principal competitors, Ford Motor Company and General Motors Corporation, and that the interest of Chrysler in possible acquisitions of assets of non-retained carriers by retained carriers was a legitimate one and one which, in large part, was motivated by a desire to minimize hardship to the owners and employees of non-retained carriers.

In any event, whatever the intentions of Chrysler might have been, there is no evidence of any agreement on the part of Commercial not to compete for any traffic which it could lawfully carry under its certificated operating authority or, as discussed above, to participate in any program of absorption of non-retained carriers.*

There is no evidence in the record that Commercial ceased competing for Chrysler's traffic. This competition, which prior to adoption of the Carrier Retention Program included solicitation of Chrysler and of the dealers, continued after adoption of the program by solicitation of Chrysler. Indeed, the letter to Chrysler from the president of Commercial of July 2, 1957, which is referred to in the petition (page 23) as evidence of some conspiratorial understanding between Commercial and Chrysler, clearly evidences Commercial's continued attempts after announcement of the Carrier Retention Program to solicit additional traffic from Chrysler.**

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* In this connection, it should be noted that Commercial and all of the other carriers involved were common carriers certificated by the Interstate Commerce Commission. Each carrier had authority to transport motor vehicles from specified origin points to specified destination points. The carriers competed with one another only to the extent their operating authorities overlapped and in some instances only one carrier had operating authority for a given route. Purchase or sale of the assets of any of the carriers was also subject to approval by the Commission.

** Petitioner at trial placed great weight on this letter and it is specifically discussed in Finding of Fact 30 (Appendix B to Petition, page 59). The trial court concluded:

> "This letter, and the other discussions between Commercial and Chrysler as to which any evidence was introduced, constituted nothing more than attempts by a single carrier, acting unilaterally, to compete with other carriers with duplicating operating rights by solicitation of additional business from a shipper."

4. The petition insofar as it relates to plaintiff's charges of combination or conspiracy does not present a "unique and important question of Federal antitrust law."

The petition, insofar as it relates to Commercial, does not present a "unique and important question of Federal antitrust law", as alleged by petitioner (Petition, page 23). On the contrary, disposition of petitioner's charges of a combination or conspiracy among Chrysler, Commercial and other retained carriers involves nothing more than a simple application of the fundamental principle that a trader engaged in a private business has the right freely to exercise his own independent discretion as to the parties with whom he will deal. *United States* v. *Colgate & Co.*, 250 U. S. 300, 307; *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 212.

Petitioner's appeal to decisions such as *United States* v. *Parke, Davis and Company*, 362 U. S. 29 and *Silver* v. *New York Stock Exchange*, 373 U. S. 341, which hold that *concerted* refusals to deal by a group of persons can be violative of the antitrust laws, is inapposite. The trial court here found that Chrysler's refusal to deal with non-retained carriers was a unilateral decision and that there was no evidence that Commercial or any other retained carrier entered into any contract, combination, agreement, understanding or conspiracy with Chrysler not to deal with non-retained carriers (Findings of Fact, 40 and 41, Appendix B to Petition, p. 63). As shown above, petitioner has failed to show that such finding of fact was clearly erroneous.

Petitioner's basic complaint in this action is that Chrysler gave its transportation business to Commercial and to the other retained carriers and not to plaintiff. The principle it espouses seems to be "once serve, always serve." The courts have never interceded merely because

"one competitor succeeded and necessarily the other failed". *Parmelee Transportation Co.* v. *Keeshin*, 292 F. 2d 794, 804 (7th Cir. 1961).

The basic principles of law established by the cases cited above have been repeatedly applied in cases involving fact situations analogous to the one in this action. *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), *aff'd per curiam*, 239 F. 2d 176 (4th Cir. 1956), *cert. denied*, 355 U. S. 823 (1957); *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957); *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (5th Cir.), *cert. denied*, 348 U. S. 821 (1954); *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F. 2d 289 (2d Cir. 1955). No significant issue of law is raised in this case by petitioner's allegations of combination or conspiracy which have not been settled in these decisions.

CONCLUSION

The petition, at least insofar as it seeks review with respect to Question 2 in the statement of questions presented contained therein, presents no issue appropriate for consideration by this Court and should be denied.

Respectfully submitted,

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March 10, 1965

was competing in and attempting to make a profit from the business of selling the "tied" item as such.

The decision in *Goodyear Tire and Rubber Co.* v. *Federal Trade Commission*, 331 F. 2d 394 (7th Cir. 1964), *cert. granted*, December 14, 1964, to the extent, if any, that it involves the selling of gasoline only on condition that the purchaser buy a certain brand of auto accessories from which the seller receives a commission, is not materially different from *Osborn* v. *Sinclair Refining Co., supra.*

On the other hand, when the seller clearly is not engaging in the business of selling the "tied" item as such, insists on combining with the sale of his product or service the sale of an interrelated product or service in order to improve his competitive position in the "tying" item's market, and seeks no profit from the sale of the "tied" item (except insofar as it improves his competitive position in the "tying" item's market), free competition in the "tied" item's market is not adversely affected and the "tying" of two separately saleable items does not constitute a *per se* violation of the Sherman Act.

The cases of *Nelligan* v. *Ford Motor Co.*, 262 F. 2d 556 (4th Cir. 1959), and *Miller Motors, Inc.* v. *Ford Motor Co.*, 252 F. 2d 441 (4th Cir. 1958) illustrate this principle. In each of these cases Ford was charged with violating Section 1 of the Sherman Act by "tying" to the sale of its Lincoln and Mercury motor vehicles a requirement that the purchasing dealer pay a certain amount of monies into a cooperative advertising fund known as the Lincoln-Mercury Dealer Advertising Fund. In both cases the

Court of Appeals for the Fourth Circuit rejected the contention, pointing out in the *Miller Motors* case, *supra,* at p. 446:

> "It is not shown that Ford had any interest in the Kenyon and Eckhardt advertising agency except to obtain effective advertising service from it. Ford was not using its economic position as an automobile manufacturer to invade and dominate the advertising business."

and in the *Nelligan* case, *supra,* at p. 558:

> "Like Miller, this case is distinguishable from the GMAC case, United States v. General Motors Corp., 7 Cir., 121 F.2d 376, . . . (3) GMAC was selling financing and was in active competition with, other finance companies. Neither Ford nor LMDA is selling advertising; both of them are buying advertising. It is not alleged that Ford had any interest in the advertising agency used by LMDA except to obtain effective advertising service from it. All agencies and all media had a right to compete for the advertising purchased by LMDA."

In the instant case although petitioner's evidence and Chrysler's admissions show that Chrysler required its dealers to purchase new vehicles under terms of sale that permitted Chrysler to arrange and prepay and to separately charge the dealer for all transportation services connected with delivering the vehicle to the dealer. there is no evidence whatsoever that Chrysler *competed* in the business of furnishing transportation services or sought to make a profit, by a commission or otherwise, from the furnishing

of such services by the carriers whom it selected and paid. As the Court of Appeals noted in its opinion (Pet. p. 36):

> "Considering now the facts of the case before us, Chrysler owned no transportation companies and had no financial interest in any of the transportation carriers to which it tendered traffic for its 1958 and subsequent models. It did not seek to invade and dominate the automobile transportation carriers' business. True, Chrysler benefited financially to the extent that it saved millions of dollars in the cost of transportation but it received no direct profits from the transportation carriers. Chrysler made no permanent commitments to any of the carriers which it selected to transport its 1958 model vehicles. As was announced at the meeting of July 17, 1957, it would, from time to time, make such changes in its traffic policies as it deemed appropriate."

Further, the record clearly shows that all of Chrysler's actions of which petitioner complains, including its insistence on arranging for the transportation of the vehicles it sold to retail dealers throughout the country, had as their primary purpose achieving a more timely and economical delivery of its vehicles to the dealers and their customers and thereby improving Chrysler's competitive position in the business of selling *new motor vehicles*,—not transportation services. Thus, the Outbound Transportation proposal that Chrysler's Administrative Committee adopted in January, 1957 had as its express purpose (R. 530a):

> "INSURE THE TIMELY, ECONOMICAL DELIVERY OF THE VEHICULAR PRODUCTS OF THIS CORPORATION TO THE DEALER AND CUSTOMER THRU THE EFFICIENT EMPLOYMENT OF TRANSPORTATION FACILITIES."

There is not one word in that adopted proposal to support a claim that Chrysler wished or intended to compete in the business of furnishing the transportation services that the sales of its vehicles to dealers throughout the country necessarily entailed. Chrysler's sole concern was to enhance its position as a seller of motor vehicles, the product that petitioner claims is the "tying" product in this case.

Chrysler's concern in this respect points up the fact that transportation, although itself a separate trade or line of commerce, is so necessary and important an element in the business of selling new automobiles on a national basis as to be an integral part of that business. In such circumstances an automobile manufacturer's insistence on selling in a single package both the new motor vehicles and the transportation service necessary to deliver those vehicles from the factory to the dealer's place of business is no more an illegal "tie in" sale than is the milk dealer's insistence on selling his product only with the container in which he packages it. As the case of *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F. 2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961) interestingly illustrates, there is no unreasonable restraint of trade when, for valid reasons relating solely to the commerce of the claimed "tying" product, a seller refuses to sell the "tying" product separate from another and different product. In that case the defendant, a manufacturer both of silos

and of a patented unloading device, refused to sell its unloader except for installation in one of its glass-lined silos. It adopted this sales policy because over a period of years it had found its customers frequently attempted to use its unloaders in types of containers in which the unloaders were not designed to function. As a result, defendant through no fault of its own had accumulated a large percentage of dissatisfied customers. In rejecting the plaintiff's contention that A. O. Smith's limitation on the sales of its unloaders was an illegal tying arrangement, the Court of Appeals for the First Circuit pointed out, *supra* at p. 655:

> "We may agree with the plaintiff that the compulsory joining of two 'separate' articles is a per se violation of the act. This statement, however, solves nothing. Articles, though physically distinct, may be related through circumstances. The sound business interests of the seller or, phrasing it another way, a substantial hardship apart from the loss of the tie-in sale may be such a circumstance. It would not be thought, for example, that a one-legged man could insist on purchasing only a left shoe. Whatever may be meant by per se, we must first consider what may be fairly treated by a seller as inseparable. See, in general, Turner, The Validity of Tying Arrangements under the Antitrust Laws, 72 Harv.L. Rev. 50, 68-72 (1958)."

The same rationale can and should apply when, as here, a manufacturer, in order to assure a more timely and economical delivery of its products to more than 6,000 dealers throughout the country, centrally arranges for and exercises a purchaser's con-

trol over all the outbound transportation services necessary to market its products effectively. In such circumstances sound and sensible business considerations justify treating the transportation services necessary to carry out the sales of motor vehicles as an integral part of the product sold. In this respect transportation is as much a part of a nationally distributed automobile as are its separately manufactured and separately saleable tires.

For all the foregoing reasons the decision of the Court of Appeals here sought to be reviewed is in no way contrary to the decisions of this Court or in conflict with the decisions of the Courts of Appeal for other circuits relating to the validity of tying arrangements under the anti-trust laws.

With respect to the second question presented by the petition, respondent Chrysler adopts the brief in opposition filed herein on behalf of respondent, Commercial Carriers, Incorporated.

Conclusion

The petition presents no issue appropriate for consideration by this Court and should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 888

CRAWFORD TRANSPORT COMPANY, INCORPORATED,

Petitioner,

v.

CHRYSLER CORPORATION

and

COMMERCIAL CARRIERS, INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT COMMERCIAL CARRIERS, INCORPORATED

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